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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891.

No. 170.

BENJAMIN F. BUTLER, PLAINTIFF IN ERROR,

vs.

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED OCTOBER 8, 1888.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between the National Home for Disabled Volunteer Soldiers, an establishment and corporation duly created and existing under the laws of the United States of America for the care and relief of the disabled volunteers of the said United States, and having its principal place of business in the city of Hartford, in the State of Connecticut, plaintiff, and Benjamin F. Butler, of Lowell, in the county of Middlesex and Commonwealth of Massachusetts, attorney and counsellor at law, but having his usual place of business in Boston, in the county of Suffolk and Commonwealth aforesaid, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said Benjamin F. Butler, defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-fourth day of January, in the year of our Lord one thousand eight hundred and eighty-eight.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States,
District of Massachusetts.

Allowed by—
LE BARON B. COLT,
Circuit Judge.

2 CIRCUIT COURT OF THE UNITED STATES, *District of Massachusetts,* } *ss:*

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

Seal of the Circuit Court, Massachusetts.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this tenth day of April, A. D. 1888.

JOHN G. STETSON, *Clerk.*

3 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss.*:

At a circuit court of the United States for the first circuit begun and holden at Boston, within and for the district of Massachusetts, on Friday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-six, before the Honorable Le Baron B. Colt, circuit judge.

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, an Establishment and Corporation Duly Created and Existing under the Laws of the United States of America for the Care and Relief of the Disabled Volunteers of the said United States, and Having its Principal Place of Business in the City of Hartford, in the State of Connecticut, Plaintiff,

v.

BENJAMIN F. BUTLER, of Lowell, in the County of Middlesex and Commonwealth of Massachusetts, Attorney and Counsellor at Law, but Having His Usual Place of Business in Boston, in the County of Suffolk and Commonwealth Aforesaid, Defendant.

No. 2558, Law Docket.

In an action of contract.

4 The writ in this cause is dated the seventeenth day of March, A. D. 1885, and is made returnable before the justices of the supreme judicial court of the Commonwealth of Massachusetts, then next to be holden at Boston, within and for the county of Suffolk, on the first Tuesday of April, A. D. 1885, and was thence removed to this circuit court upon the petition of the defendant, filed and allowed in said supreme judicial court, and was entered here at the October term of this court, A. D. 1885, when and where the parties appeared by their respective attorneys.

Upon the entry of said cause in this circuit court attested copies were filed of the following eleven papers on file in the said supreme judicial court, namely:

1, writ, with return of service thereon; 2, plaintiff's declaration; 3, appearance; 4, agreement; 5, answer; 6, defendant's declaration in set-off; 7, claim of jury; 8, petition for removal; 9, bond on re-

moval; 10, motion to amend petition for removal; 11, decree and order for removal.

Which said attested copies are in the words and figures following:

1. *Writ.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk*, } *ss.:*

[L. S.] To the sheriffs of our several counties or their deputies, Greeting:

We command you to attach the goods or estate of Benjamin F. Butler, of Lowell, in the county of Middlesex and Commonwealth of Massachusetts, attorney and counsellor at law, but having his usual place of business in Boston, in the county of Suffolk and Commonwealth aforesaid, to the value of twenty thousand dollars, and summon the said Butler (if he may be found in your precinct) to appear before our justices of our supreme judicial court, next to be holden at Boston, within and for our said county of Suffolk, on the first Tuesday of April next, then and there, in our said court, to answer unto the National Home for Disabled Volunteer Soldiers, an establishment and corporation duly created and existing under the laws of the United States of America for the care and relief of the disabled volunteers of the said United States, and having its principal place of business in the city of Hartford, in the State of Connecticut, in an action of contract—

To the damage of the said plaintiff (as it says) the sum of twenty thousand dollars, which shall then and there be made to appear, with other due damages; and have you there this writ, with your doings therein.

Witness Marcus Morton, Esquire, at Boston, the seventeenth day of March, in the year of our Lord one thousand eight hundred and eighty-five.

JOHN NOBLE, *Clerk.*

A true copy.
Attest: JOHN NOBLE, *Clerk.*

COUNTY OF SUFFOLK, *ss.:*

George P. Sanger, in behalf of the plaintiff in this writ, before the service thereof, on oath declares that he verily believes the matter sought to be recovered in the action hereby commenced actually equals in amount or value the sum of four thousand dollars.

GEORGE P. SANGER.

Subscribed and sworn to this seventeenth day of March, A. D. 1885, before me—

CHAS. ALMY, JR.,
Justice of the Peace.

SUFFOLK, *ss.:*

BOSTON, *March 17th*, 1885.

By virtue of this writ I this day attached a chip as the property

of the within-named defendant, Benjamin F. Butler, and delivered a summons to him in hand for his appearance to answer at court as within directed.

FRED. H. SEAVEY,
Deputy Sheriff.

Service & travel, .58.

2. *Plaintiff's Declaration.*

And the plaintiff says the defendant owes it the sum of fifteen thousand dollars, money had and received by the defendant to the use of the plaintiff, as by the bill of particulars below, and interest thereon from November 20, 1879.

Bill of Particulars.

7 Said sum of fifteen thousand dollars is that amount of money of the plaintiff corporation loaned and sent by the defendant, then acting treasurer of said corporation, May 6, 1879, to General Wm. S. Tilton, acting treasurer Eastern branch of said home, at Togus, Maine, and received there by said Tilton May 6, 1879, and charged by the said defendant as a credit in his accounts with the plaintiff. The said sum was repaid by said Tilton to said defendant November 20, 1879, but said payment has not been accounted for by said defendant in any way, and said sum of fifteen thousand dollars is due from the said defendant to the said plaintiff, with interest from November 20, 1879.

Second count. And the plaintiff says that heretofore, to wit, from the year 1876 to the year 1882, defendant was its treasurer, and as such treasurer, on a certain day, to wit, May 6, 1879, loaned of the money and funds of the plaintiff to one William S. Tilton the sum of fifteen thousand dollars, and on a certain later day, to wit, on the 20th November, 1879, said Tilton repaid the amount of said loan to the defendant, and the defendant received the same to the use of the plaintiff and has never made over, paid, or accounted for the same to the plaintiff, and the plaintiff thereupon, to wit, on said last-named day, duly demanded the same and payment thereof from the defendant, and defendant owes the plaintiff the said sum of fifteen thousand dollars, with interest thereon from said last-named date.

Both of the foregoing counts are for the same cause of action.

GEORGE P. SANGER,
Att'y for Plaintiff.

Filed April 7, 1885.
A true copy.
Attest: JOHN NOBLE, *Clerk.*

8 3. *Appearance.*

I appear for the defendant in above case.

FRANK L. WASHBURN.

Filed April 17, 1885.
Att.: HENRY A. CLAPP, *Ass't Clerk.*

A true copy.
Attest: JOHN NOBLE, *Clerk.*

4. *Agreement.*

In the above-entitled case it is hereby agreed that any defense on the part of said defendant, whether in the nature of an answer in abatement, demurrer, plea in abatement, or motion to dismiss, may be filed in said case within ten days from date hereof and have the same validity and effect as if filed within the usual time for special matter.

GEORGE P. SANGER,
Pl'ff's Att'y.

Filed April 17, 1885.
A true copy.
Attest: JOHN NOBLE, *Clerk.*

5. *Defendant's Answer.*

And now comes said defendant and, for answer, denies each and every item, allegation, and averment in the plaintiff's writ and declaration contained.

And, further, the defendant answers that he has paid the plaintiff in full all money or sums of money which at any time
9 he ever owed said plaintiff, due accord and satisfaction having been made.

BENJ. F. BUTLER,
By his attorney, FRANK L. WASHBURN.

Filed May 6, 1885.
A true copy.
Attest: JOHN NOBLE, *Clerk.*

6. *Defendant's Declaration in Set-Off.*

The defendant says that he was directed by the board of managers and directors of said National Soldiers' Home to act as treasurer of said home, which was not his official duty to do, and he continued to act as treasurer of said home until the expiration of his term of service as a manager of said home; that said service was very onerous and responsible, and therein he collected, invested, reinvested, took charge of, paid out very large sums of money, in the aggregate more than ten millions of dollars, and kept the records and accounts and examined the vouchers thereof; that he was relieved from that duty and service at his own request after he had ceased to be a member of said board. Wherefore he claims just and proper compensation for his services in that behalf.

BENJ. F. BUTLER,
By FRANK L. WASHBURN,
His Attorney.

Filed May 6, 1885.
A true copy.
Attest: JOHN NOBLE, *Clerk.*

10 7. *Claim of Jury.*

And now comes the defendant in the above-entitled action and gives notice that he desires a trial by jury in said action.

By his attorney, FRANK L. WASHBURN.

Filed May 6, 1885.
A true copy.
Attest: JOHN NOBLE, *Clerk.*

8. *Petition for Removal.*

Your petitioner, Benjamin F. Butler, the said defendant, respectfully shows this honorable court that the matter and amount in dispute in the above-entitled suit exceeds, exclusive of costs, the sum and value of five hundred (500) dollars, and said suit is of a civil nature at law, and is now pending in said supreme judicial court.

That the controversy in said suit is wholly between citizens of different States, and that your petitioner was at the time of the commencement of this suit and still is a citizen of the State of Massachusetts, and that said plaintiff is not now and was not at the time of the commencement of said suit a citizen of Massachusetts aforesaid, but was then and is now a citizen of the United States and of another State of the United States than Massachusetts.

And your petitioner offers herewith a bond, with good and
11 sufficient surety, for his entering in said circuit court of the United States, on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by said circuit court if said court shall hold that this suit was wrongfully or improperly removed thereto.

And your petitioner prays this honorable court to proceed no further herein, except to make the order of removal and to accept the said surety and bond, and to cause the record herein to be removed into said circuit court of the United States in and for said said district of Massachusetts; and will ever pray.

(Signed) BENJAMIN F. BUTLER,
By FRANK L. WASHBURN,
His Attorney.

Filed Aug. 28, 1885.
A true copy.
Attest: JOHN NOBLE, *Clerk.*

9. *Bond on Removal.*

Know all men by these presents that I, Benjamin F. Butler, of Lowell, in the county of Middlesex and Commonwealth of Massachusetts, as principal, and Prentiss Webster, of said Lowell, as surety, are held and firmly bound unto the National Home for Disabled Volunteer Soldiers, a corporation duly established by law, in the penal sum of five hundred (500) dollars, the payment whereof, well

and truly to be made unto the said National Home for Dis-
12 abled Volunteer Soldiers, its successors and assigns, we bind ourselves, our heirs, representatives, and assigns, jointly and severally, firmly by these presents—

Yet upon these conditions: The said Benjamin F. Butler having petitioned the supreme judicial court in the county of Suffolk and Commonwealth of Massachusetts for the removal of a certain cause therein pending, wherein the National Home for Disabled Volunteer Soldiers is plaintiff and said Benjamin F. Butler is defendant, to the circuit court of the United States in and for the district of Massachusetts:

Now, if said Benjamin F. Butler, your petitioner, shall enter in the said circuit of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise in full force and virtue.

Witness our hands and seals this twenty-ninth day of August, A. D. 1885.

BENJ. F. BUTLER. [SEAL.]
PRENTISS WEBSTER. [SEAL.]

Witness to signatures:
FRANK L. WASHBURN to both.

Filed Aug. 28, 1885.

SUFFOLK, *ss*:

AUGUST 31, 1885.

Bond approved.

OLIVER W. HOLMES, JR., *J. S., J. C.*

A true copy.
Attest: JOHN NOBLE, *Clerk.*

13 10. *Motion to Amend Petition for Removal.*

"That said plaintiff is a corporation organized and created by an act of Congress, and that said suit and the matters in dispute therein arise under the laws of the United States."

FRANK L. WASHBURN,
Def't's Attorney.

Filed and allowed Oct. 13, 1885.
A true copy.
Attest: JOHN NOBLE, *Clerk.*

11. *Decree and Order for Removal.*

And now in the above-entitled cause it appearing to the court that the defendant has duly filed in this court his petition praying for the removal of said cause to the circuit court of the United States of America for the district of Massachusetts, and also a satis-

factory bond, pursuant to the statutes of the United States, it is ordered that this cause be removed to said circuit court of the United States in accordance with the prayer of said petitioner; and the court finds as a fact that said plaintiff is not a citizen of said Massachusetts and has no place of business and is not located in said Massachusetts.

By the court: JOHN NOBLE, *Clerk.*

October 13, 1885.

A true copy.
Attest: JOHN NOBLE, *Clerk.*

14 After entry of this cause as aforesaid, at the October term of this court, A. D. 1885, the plaintiff, on the twelfth day of May, A. D. 1886, filed the following answer to defendant's declaration in set-off:

Answer to Defendant's Declaration in Set-Off. (*Filed May* 12, 1886.)

And now comes the plaintiff and for answer to defendant's declaration in set-off admits that the said defendant was for a time a member of the board of managers of the plaintiff corporation, as therein alleged, and acted as treasurer during such time, but denies that he has any legal claim for services as such treasurer or otherwise.

And the plaintiff, for further answer to said declaration in set-off, says that there never was any agreement or understanding between said board of managers and the defendant that defendant should receive any compensation whatever for any services rendered or to be rendered or any duties performed or to be performed by him in connection with said plaintiff corporation, and no salary or other compensation therefor was ever determined, agreed upon, or fixed by said board, and the defendant never made any claim or demand upon the plaintiff for compensation for such services prior to the filing of the said declaration in set-off.

And the plaintiff, for further answer to said declaration in set-off, denies each and every allegation thereof, except as is otherwise herein expressly admitted.

The plaintiff corporation by its attorney,
GEORGE P. SANGER.

15 This cause was thence continued to the October term, A. D. 1886, when the following motion was filed:

Motion to Dismiss. (*Filed Nov.* 29, 1886.)

And now comes the defendant in the above-entitled action and moves that the same may be dismissed for want of jurisdiction, apparent on the record.

BENJAMIN F. BUTLER,
By E. M. JOHNSON, *Of Counsel.*

Which motion was, on the second day of December, A. D. 1886, heard and overruled by the court, the Honorable George M. Carpenter, district judge of the United States for the district of Rhode Island, duly assigned by the Honorable Le Baron B. Colt, circuit judge, to hold said circuit court, sitting.

Issue being joined in this cause, a jury was thereupon empanelled and sworn according to law to try the same, who, after hearing all matters and things concerning the same, returned their verdict and on oath said: The jury find for the plaintiff and assess damages in the sum of sixteen thousand five hundred and thirty-seven dollars and fifty cents.

On the thirteenth day of May, A. D. 1887, the following bill of exceptions was allowed and ordered to be filed as of December 3, 1886, before the jury left the bar:

Bill of Exceptions. (*Allowed and Filed as of December* 3, 1886.)

This was an action of contract to recover the sum of $15,000. The pleadings may be referred to, and are hereby made a part of this bill of exceptions.

16 At the trial it appeared in evidence that the defendant, as acting treasurer of the plaintiff corporation, on the seventh day of May, 1879, paid to one William S. Tilton, manager of the Eastern Branch Home, the sum of $15,000 to be used for the purchase of leather for the manufacture of boots and shoes at the Eastern branch, and charged the same as so paid out in his account with the home; that on October 13th, 1879, said Tilton, in payment for said advance, sent to the defendant a sight draft for $9,838.00, drawn by defendant on his financial agent and book-keeper, George J. Carney, payable to the order of Pitkin & Thomas, and sent by defendant, as such acting treasurer, to said Pitkin & Thomas in payment for clothing furnished the home, and by Pitkin & Thomas endorsed and sent to Tilton in payment for boots and shoes purchased by them of said Tilton, and with said draft sent his own receipt, as acting treasurer of the Eastern branch, for the balance, making up the $15,000.00; which receipt was as follows:

TOGUS, ME., *Oct.* 13, 1879.

Receipt for money this day received from Gen. B. F. Butler, acting treasurer of the National Home for Disabled Volunteer Soldiers, $5,162.

WILLIAM S. TILTON,
Acting Treas.

Said draft and receipt were enclosed in a letter to said Carney, which was as follows.

TOGUS, ME., *Oct.* 13, 1879.

Col. George J. Carney, financial agent, Lowell, Mass.

MY DEAR COL.: The General has requested me to arrange
17 for the settlement of the $15,000 which he loaned me for the purchase of leather.

I enclose General Butler's draft on you at sight	9,838
And my treasurer's receipt for	5,162
	$15,000

The home owed me a balance of $5,985.81 on 30th Sept., '79, so the above balance (for which I send you regular treasurer's receipt *is* duplicate) will go far towards making us square on the ordinary home expenditures.

WILLIAM S. TILTON,
Acting Treas.

It further appeared that Tilton never took up on his regular account with the home the receipt of this $15,000, May 7, 1879, nor entered in said account the repayment thereof, but entered both transactions in his "shoe-shop books."

It also appeared that said $5,162 was never in fact paid to Tilton, but that subsequently defendant gave Tilton an invoice for that sum the same as if it had been paid, and that Tilton took the same up on his regular account with the home and accounted for it.

It further appeared that defendant's accounts as acting treasurer of the home were rendered quarterly on the last days of December, March, June, and September, and in defendant's account for the quarter ending December 31, 1879, which was put in evidence, no credit was given the home for the draft and receipt sent by Tilton, but the home was therein charged, under date of Nov. 20, 1879, with the payment to Pitkin & Thomas of said sum of $9,838, and
18 the payment to Tilton of said sum of $5,162.

Plaintiff produced at the trial and offered in evidence all the subsequent quarterly accounts rendered by defendant as acting treasurer of the home, to show that no credit for the payment by Tilton was ever given, but upon defendant's objection the court excluded them as unnecessary, saying, however, that defendant might himself introduce such subsequent accounts to show that he had accounted for said money after the proper quarter, if such was the fact.

It further appeared that in defendant's account book, kept by Carney, in connection with the entry of the payment by defendant on Nov. 20, 1879, of said sums of $9,838 and $5,162 to Pitkin & Thomas and Tilton respectively, was the following memorandum in Carney's writing: "No money passes from G. J. C. to settle these; they offset an advance to Tilton."

Plaintiff corporation also put in evidence the following letters from defendant to Gen. William B. Franklin, who succeeded defendant as president of the board of managers of the plaintiff corporation, who was a witness called by plaintiff:

BOSTON, MASS., *July* 11, 1882.

MY DEAR SIR: I have been informed of some discrepancy between my account and the account of Gen. Tilton, acting treasurer at the Eastern branch of the home. It seems to have been as to some ad-

vances made to the shoe shop. It was brought to my attention some time since by Col. Brown and by Gen. Tilton. Of the fact and the account upon which it is stated I have no personal knowledge. My financial agent, who kept the books, finds certain entries upon the books, which, if they cannot be explained, would seem to justify Gen. Tilton, whom I believe to be right about it. If he is right, then there is an unexplained discrepancy in my books, which will require a very extended examination of my accounts, and, as soon as I can ascertain exactly how the matter is, of course it will be adjusted.

I write this letter to you so that Gen. Tilton's position in the matter will be understood and to say that he has done on his part all that he can do to have the matter adjusted, and that he can do no more until I can have my matters investigated.

I am, yours truly, B. F. BUTLER.

William B. Franklin, president board of managers, National Home D. V. S.

BOSTON, MASS., *April* 13, 1883.

MY DEAR GENERAL: On my return home I found your note on my table in regard to the fifteen thousand dollars which the Second Auditor seems to find cause for charging back in my accounts.

As you are aware, I did not personally keep the accounts. I will submit the matter to my financial agent and ascertain at the earliest possible date where the mistake is, if there is a mistake.

I should be glad to return the money to the home if it is to be turned over to anybody.

Yours truly, BENJ. F. BUTLER.

Gen. Wm. B. Franklin, Hartford, Conn.

Defendant, on cross-examination of said Franklin, showed that the latter of the above letters was in response to a letter from witness to defendant, which was as follows:

HARTFORD, CONN., *March* 29, 1883.

Gen. Benj. F. Butler, Boston, Mass.

MY DEAR GENERAL: I enclose you with this copies of papers, which I received from the 2nd Auditor yesterday, showing the statement of that office as to the $15,000 item which seems to be due in the final settlement of your account as treasurer of the home.

Should it appear to you that this sum is due the United States or the home from you, if you will turn it over to me I will receipt to you for it and take it up in my accounts. This course will save the money to the home, as, if it is covered into the U. S. Treasury, I know no way in which the home can get it out again. As Gen. Tilton has resigned the governorship of the Eastern branch from the 31st, I will be glad to hear from you on the subject as soon as is convenient to you.

Respectfully yours, W. B. FRANKLIN,
Act'g Treas'r, N. H. D. V. S.

At the close of the plaintiff's evidence defendant requested the court to rule that there was no evidence sufficient upon the pleadings to warrant a verdict, on the ground that there had been no evidence that the draft and voucher had not been accounted for. The court ruled the evidence sufficient to sustain a verdict; to which defendant excepted.

The defendant's opening, evidence, and the rulings and charge of the court were as hereinafter stated, and exceptions were taken by defendant, as hereinafter set forth.

Opening for the Defendant by B. F. Butler, Esq.

May it please your honor, you, Mr. Foreman, and gentlemen: I have thought it due to myself and to you that you should understand this matter as I understand it or that you should find out how I misunderstand it; and then there is another matter still further; there is a set-off—that is, a claim for services as acting treasurer of the asylum for some portion of the time and under certain circumstances which I shall explain to you. The National Asylum was incorporated in 1865. It had a hundred incorporators. They never could get together. In 1866 Congress passed an act amending
22 that act, and putting the whole business in the hands of a board managers consisting of the President of the United States, Chief Justice of the United States, the Secretary of War, and nine other gentlemen, to be selected by Congress by resolution, who should serve each for six years, only, like the Senate, one must go out every two years, so as to give a perpetual succession; and that board of managers were empowered to have a corporate seal, to sue and be sued, and to appoint certain officers by ballot and to establish such homes. They were called then asylums; but the soldiers objected to going to an asylum, and so Congress passed an act calling it the National home; therefore you will see the reason why it changes from time to time. They appointed a president, myself, a vice-president, and a junior vice-president and a secretary. The business of the managers first was to select sites for an asylum or home for disabled soldiers, to care for them there, and to expend in doing so a fund which had been provided for the volunteer soldiers in the same manner that a fund had been provided for the regular-army soldiers after the Mexican war.

That is, all the deserters' pay, which they had forfeited, was put into the fund; all the pay due to dead officers and soldiers, whose heirs did not apply for it, was put into the fund; but the asylum was to pay back out of that fund any money that the legal representatives of any deceased officer or soldier applied for; also all the money forfeited to provost marshals, and that, it may, perhaps, not be inappropriate to say, was a very large sum, because the provost marshals were at the head of the recruiting camps, and a
23 very great many men came into the camps with large bounties in their pockets paid by towns and then deserted, ran away, and left it in the hands of the provost marshals, so that they were not soldiers in another sense; and that fund was found out in

this way, the roll of each regiment was taken, and the account of each provost marshal, and examined by the proper clerks in the Second Auditor's office of the Treasury, and as the amounts were found due they went to the credit of the fund, and monthly the board of managers drew for their balance as they needed it, which was found due monthly. The balances, as you will see, would be very irregular. Some rolls would have no deserters, substantially; other regiments would have a great many. Some rolls would have no dead; others would have a great many.

The board of managers then established four homes—one at the Eastern branch, which you have heard of, at what is called Togus, Me., about four miles from Augusta, Togus Springs. That happened to be established first from the fortuitous circumstance that we bought out the buildings and establishment of a large watering place there before we built any others. That was called the Eastern branch. The next was the Central branch, at Dayton, Ohio, of which the very able and respectable gentleman who was on the stand, Col. Brown, who is now inspector general of the homes, was, I believe, the first governor, and held the position for many years.

Then the ladies of Milwaukee made the establishment a very generous donation of about $100,000 to have a branch established there, they having raised that money for the purpose of establishing one for themselves; so that the Northwestern branch was
24 established at Milwaukee. Then came the Southern branch, originally established for the purpose of dealing with the negro soldiers who were sick, but which afterwards became and is now a very large establishment, I think the second largest.

The numbers of volunteer soldiers who came into these homes were at first very small. Afterwards, as families broke up and men became disabled by their wounds, they came in in great numbers, much exceeding the deaths, until there got to be at the time I left—my term of office expired, after three elections, in 1880—there were about 8,000 in all the homes; about 4,000 at the Central branch, from 700 to 1,000 in the Eastern branch, about the same number at the Northwestern branch, and about the same number at the Southern branch. They were all to be fed, clothed, cared for in every way until they reached their final resting place.

The matter being very small at first, no treasurer was elected, and after some months I was appointed, as will be shown you, acting treasurer and served from that time until after I ceased to be president, by the expiration of my term of office. As Gen. Franklin told you, at the request of the new board of management, I acted until they got organized. I was acting treasurer of the general home, as Gen. Tilton expressed it—meaning the establishment or the general corporation. Each home was governed by a set of officers, a governor, a treasurer, and a secretary, and other subordinate officers chosen by the governors of the homes—meaning the several branches.

The accounts of the several homes were kept by their several officers, and once in three months an auditing committee of
25 the board of managers went to the several homes and exam-

ined the accounts carefully and audited them, and reported to the board how they found them. Duplicates of these accounts were forwarded to the president of the asylum, to be preserved for future reference. Once in three months the board met at each home, not every home, but once in three months at the four homes, and very often the accounts were audited by the auditing committee at those times, but not always.

With those accounts I had nothing to do—the general treasurer had nothing to do. His business was to receive any donations that were made to the home and invest them; to receive from the United States the moneys which should be required and invest them or keep them for the purposes of carrying on the homes, and to pay the bills and to distribute the money according to the appropriations, one-third each month of the regular appropriations, and for anything that might be required for the homes. And then the accounts of the acting treasurer were to be audited by the auditing committee of the home.

You will see, therefore, gentlemen, that the acting treasurer had only a cash account to keep. He had no other accounts to keep, and it was necessary for the integrity of his books and for their proper keeping that he should have no other accounts to keep. To aid him a clerk was given him to keep those accounts and to act as book-keeper. Those accounts were all after 1871, I think, kept by Mr. Geo. J. Carney, of Lowell. Mr. Carney was a man who was and had been for many years, as had his father before him, at the head of the principal savings institution in Lowell, with a deposit of some
26 four millions, and he is there now. From that time he kept the entire accounts, rightly or wrongly, and after you have seen him and seen the accounts, I am content you should judge. The treasurer had implicit confidence in him. His father and he had managed the financial affairs of the treasurer in his own behalf, the treasurer being a busy man over various parts of the country and not able to attend to these matters much. These accounts were kept in that way, every word of them in the handwriting of Mr. Carney and in the book which I shall show you, and were from time to time audited, as the committee of the board of managers saw fit, audited by a committee, and once audited by a committee of Congress, Congress desiring at one time to look into the doings of the establishment. That committee audited the books and certified to the correctness of the accounts.

The mode, substantially, of the account would be, on the one side the moneys furnished by the Government, and on the other the charges of approved bills that had been paid. Those approved bills and everything else that went as a voucher were returned to the auditing committee, and they audited the books. The acting treasurer was never present at one of these audits, for reasons you will appreciate. If the books were right they would speak for themselves; if they were not right he could not speak for them, for he knew nothing of them. That book and those accounts, amounting to several millions—how many you will learn—were audited, and in the course of the audit there never was one mistake found. Now,

then, gentlemen, you see that what the treasurer must have had was a cash account.

27 Now, then, having understood the general history of this matter, we will come to the transaction, which, understanding, you can understandingly apply after a single further suggestion. As you have learned already, the soldiers were employed, because a very improper personage "finds some mischief still for idle hands to do," in various manufactures. At the Central branch there were various kinds of goods manufactured, some for sale outside, and everything that could be reasonably manufactured for use in the home was manufactured in the home. Clothing was not manufactured in the homes because the soldiers wore their old uniforms, and, there being some millions of suits of uniform left over after the army was disbanded, and sold in the market, considerable quantities were donated by Congress to the home; but we found it very much cheaper to buy those overcoats and blouses, uniform coats and uniform trousers, than it would be possible to make them.

To give employment to the soldiers in the Eastern branch it was thought by the board of managers that the manufacture of boots and shoes for all the homes should be established there, and, in order to keep the men at work, others might be sold or exchanged for clothing, as you have heard from Mr. Thomas. That business was carried on under General Tilton, and, for reasons which we need not go into, was unprofitable. The board of managers, at a time which, with his honor's permission, I shall show you, got together and passed a resolution that, profit or no profit, the men must be kept at work during the long, cold winters, when they could not get out to have any exercise, in Maine, and therefore they

28 established a shoe shop, and, of course, that shoe shop must have funds to start it, and that they provided in their resolution. Thereupon, acting under that resolution, the president concluded to advance to that institution $15,000 to buy stock for it—the tools and machinery being left over from the first attempt—and directed that $15,000, in the usual course of business, be sent to Gen. Tilton, which was done and charged upon the book, as we shall show you, at the time it was sent, in the regular course of business.

Some time in May, 1879—I will not speak with certainty as to the date, the date will be before you—Gen. Tilton sent back to Mr. Carney a voucher, saying that he had received $15,000 on account of shoe shop. Mr. Carney at once sent a letter, which will be before you, saying that "your receipts must not undertake to state any account for which you receive money, only that you have received it, because we keep no accounts except the cash sent, and other people keep the accounts of what is done with it." It was not in so many words, but that was the substance of it. Thereupon a correspondence ensued, which will be before you. You have heard a copy of one letter read, and I shall show you the original in its proper connection. A correspondence ensued about this matter. Gen. Tilton desired to keep it in the form of a shoe account, because he wanted to show, with natural pride, that his shoe shop was

profitable. But that was denied him. Mr. Carney refused to alter the charge from simply $15,000; and he got a note from me, he says, and I suppose that is true, that he must adjust that matter of the shoe shop. Thereupon he sent Mr. Carney a draft from
29 Pitkin & Thomas, a draft by which a payment had been made to Pitkin & Thomas for some clothing, and also sent his receipt that he had received on that day you will observe that is the form of the receipt, your honor—that he had received on that day $5,162, which made up the $15,000. Thereupon Mr. Carney declined to enter that transaction upon the books at that time, and entered into a correspondence with Mr. Tilton, which I suppose he has forgotten.

Then Mr. Tilton said that he wanted it in a given way, because he was short in his accounts for the last quarter about $5,000, and he thought he would take that out of the shoe-shop money. I do not give the words, but the substance. The letter will be before you, so there will be no doubt that Mr. Carney declined that proposition and sent for Mr. Tilton to come up and see him, in the meantime giving him no receipt for the $9,000 draft and no receipt for the $5,162, which made the even $15,000. Mr. Tilton applied to me about it. I told him I knew nothing about the accounts. He must go to Mr. Carney. Mr. Tilton wrote a letter telling how he wanted it. He told Mr. Carney that I didn't understand it, and he explained it as he wanted it, and then told Mr. Carney that if he didn't understand it so as he wanted it, to telegraph to him and he would come up and explain it.

He came up and had a conference with Mr. Carney, and Mr. Carney told him that the matter could not be entered in any such form. "Well," said Mr. Tilton, after a talk, "very well, then, you can charge me with this amount, this draft and this receipt," which, of course, meant no money, "in any form you please, and I will take it up in my general account." "Very well," said Mr. Carney.
30 That happened on or about the 20th of November, and thereupon Mr. Carney, as we shall show you—and I only refer now to this in order to state with accuracy—on the 20th of November, 1879, entered Pitkin & Thomas' draft for $9,838 and William S. Tilton's receipt for $5,162, making $15,000, in the account as money paid to Tilton, because his receipts show it was paid; and then, of course, this was audited in the accounts—that is, my accounts stood as it should be and went into the balances from time to time, and was duly accounted for, so far as I understand the accounts. I do not pretend to be an accountant or the son of an accountant. My father was a ship-master, and I am a poor lawyer. There it stood, and in the meantime it was audited.

Now, there is only one other transaction about this. For greater certainty and in order that there might be exact vouchers for each home, whenever we transmitted any money to any home to be taken up in their accounts we sent it with an invoice stating, We have sent so much money, so-and-so. You will see what the necessity of that invoice was. If we did not send an invoice with the money which the governor or treasurer of the institution could produce he

could not show exactly what money he had had except by his own account on his books, which no auditing board would take when he received it from another party. Therefore we always sent an invoice. But he, having sent up his receipt without any invoice, when his accounts came to be examined they could not be passed. On the 30th day of June, 1880—which is the yearly settlement, and the general treasurer only settled yearly; he rendered accounts
31 once in three months but settled only yearly—when the board met at Togus, at the Eastern branch, Mr. Tilton said to me that he had no invoice of this $5,162, though he had sent us a receipt for it, and explained the circumstances. I said to him, "Of course you ought to have an invoice for that money which you sent a receipt for, else you never can settle your accounts." And thereupon I stopped into an office and directed an invoice in duplicate, one portion of which was put in here last night, to be given to Mr. Tilton. That is an invoice for $5,162, which he had receipted for as having been sent him and for which I then gave him an invoice; and, as I had already invoiced the $15,000, if that $5,000 went to to pay that, then he got $5,000 too much, but it was not so understood and was not so in the accounts.

Very well; the duplicate invoice was sent at once to Mr. Carney and the other invoice left in the hands of Mr. Tilton, where it ought to be, and of course went forward with his accounts as a voucher.

Now, then, gentlemen, nothing was heard about this transaction. I left in September, 1880, at the expiration of my term of office—not exactly that date. We were to be elected by the two houses of Congress. The two houses of Congress disagreed in politics, so that we held over, because nobody was elected to fill our places, and that is part of the charter, for two years—some of us, those that went out at that date. They didn't elect anybody in our places for two years. My time would have expired some time in April, 1880; and, as I told you, after my time expired and a gentleman from New England was elected by the two houses of Congress
32 to fill my place, after that I held on as acting treasurer at the request of the board of managers until September. Sept., 1881, my balances were turned over to Gen. Franklin, whatever they were, and my accounts were audited by the board of managers of that date, the balances being carried forward and found correct, and I never heard anything more about this until 1882, two years afterwards, when I was informed that there was some discrepancy in my accounts.

I immediately examined into my accounts as treasurer and could find none; for, gentlemen, I could easily examine my accounts with the treasury without any account whatever, because my accounts forwarded to the treasury are an exact transcript of this book, written by Mr. Carney in his own handwriting and simply certified by me, so that I could see no discrepancy. I went over them from top to toe. They said I had a balance of $15,000 in my hands. My brother was kind enough to open to you that my wealth was so immense that I do not know when I am $15,000 short or flush. Oh, no! I don't pretend to be an accountant, but I know that. My ac-

count at the bank would tell me that very quick. I could not find that I was plus a dollar nor minus a dollar, and Mr. Carney could not find I was, and I relied upon him to find out rather than upon myself; and there we were.

We were then informed that Mr. Tilton's accounts were short, and that he claimed I had some money that I hadn't given credit for. Those accounts I could not and did not examine. Mr. Tilton came to me and wanted to know if I would show my books. I had nothing to conceal. Mr. Tilton was told to go up to Lowell and Mr. Carney would show him the books, and he did show him
33 this very entry; and from the blotter, I believe, he took a copy, which he put in here before you; which copy says that here are these two entries, but no money passed. Of course there could not for the $5,162, and for the draft no money had passed, because the draft had already gone to Pitkin & Thomas, and although Tilton brought it back he promised to take the whole thing up in his account, so no money passed Mr. Carney, but he entered the transaction in that way in his blotter when he first got it. When he came to transfer it from the blotter of general accounts, which he did not do until November afterwards—it was the 13th of October when he made that entry—he transferred it, as I say, in the usual form.

And that is all that we know or I know about it. If I am liable to pay after your verdict, it will be paid. If not, it is a matter of account wherein a mistake is made that I do not believe my brothers would claim that I undertook to make it or to interfere with it or to do anything about it, although I see one of the morning journals says this affects my personal integrity. There is the case for you.

Now, there is another branch of the case, which is the set-off. Finding that I was to be holden for all the mistakes of my clerk and everybody else, I thought it but just that I should have some pay for my services. If I was doing the work for nothing, and did it as well as I knew how, they ought not to hold me responsible. It was like a gratuitous bailee—different from a bailee for hire. I was only to take such care of the asylum's moneys and accounts as I took of my own, and I trusted mine wholly to Mr. Carney,
34 and I trusted theirs to Mr. Carney. I believe that is all a gratuitous bailee is liable for.

CARPENTER, J.: A gratuitous bailee, I suppose, would be liable for conversion?

Mr. BUTLER: Certainly, if he has converted it. Oh, yes, sir; there is no doubt about it. If anybody says I have converted this money, may it please your honor, I will pay it now; but I thought if I was to be held for all mistakes I ought at least to have pay; therefore I filed a set-off.

And the set-off stands upon this ground: By the act of incorporation the managers, for their duties as managers in any act that they do as such managers, are to have no compensation, but are to have their travelling expenses; but if any officer, if any one of the members, is employed in duties outside of his official duties—my official duties were as president—then he may have such compensation as the board may determine.

Well, now, I am going to be as frank about this as I have tried to be about the rest. I did not, gentlemen of the jury, when I accepted the office of acting treasurer, mean or intend to take out of the funds for the relief of my comrades, the disabled soldiers, any money for my services, and I never have done it—never as such. I attempted to get rid of the office, and, as I shall show you, sent in my resignation to the board as acting treasurer, because it was an office in which I gave very large bonds, and in the meantime my occupation had changed, and it became very onerous to examine all manner of vouchers, and it became, too, a little trouble-
35 some, lest there should be mistakes made; but my associates, unfortunately for me, and I suppose the present board would claim unfortunately for them, did not choose to permit me to resign. They laid my resignation on the table and desired me to go on; and I went on.

But there was a change made which took effect in 1875. It being found very expensive for the Government to examine these rolls and employ so many clerks as were necessary (and, after all, the money had got to come out of the Government, because the Government had in its Treasury these forfeited funds, so that it didn't make any difference to them), Congress, after the board had reported three several times (for we were bound to report to Congress by law, with a copy of all our doings, every year), after three several recommendations of the board that the asylum be carried on by direct appropriations, Congress passed an amendatory act declaring that thereafterwards our business should be carried on by direct appropriations—that is to say, Congress each year would appropriate for carrying on our asylum as they would appropriate for carrying on this court, for instance, or the post office, directly from the Treasury of the United States. I then thought that while I was willing to work for disabled soldiers without pay that I was not quite called upon to work for the whole United States without pay. Then my services would be for the benefit of the United States, and nobody else; and I then determined in my own mind to have a salary—not a salary, but a compensation. I could not have a salary; I was not an officer in this regard, I was only acting treasurer.

But that thing, like every other, gentlemen, where men are
36 very busy and only meet once in three months, and then have piled upon them an immense amount of business and are anxious to get away—that question remained unadjusted by the board, and I allowed it to stand unadjusted. I nowhere signified and nowhere intended to signify my intention to give my services from the time when pay for my services would be drawn, not from the soldiers, but from the United States; and from that time I claim, in any event, fair and just compensation.

It was said that because there was a clause that the managers shall fix the compensation therefore I cannot have any. In an ordinary corporation the directors cannot fix the salary of one of their number in the absence of any by-law or act of incorporation. It must be the act of the incorporation; but here there was a provision that they might fix it. They have not done it, and the question is

whether by failing to fix the compensation they can deprive me thereby of a fair *quantum meruit*—that is the legal phrase, gentlemen—a fair remuneration for what my services are worth. I know they did not so intend. I do not think that is the legal effect of their non-action. I think if I have earned anything I have a right to it, whether anybody says that I may have it or not, except a jury of twelve men. At least I shall ask such an instruction.

This is not the first suit. There was another one brought earlier than this, and when that came up I concluded I would see whether my services had been worth anything before I undertook to bring a bill for them. When this suit got into a form in which the asylum was satisfied to prosecute it, the other one having become non-
suit, I filed this, what is called a set-off—that is, I filed a claim
37 for my services. This is the case, gentlemen, and I think you will find that at least I am blameless in the matter, whatever may be the result of the book-keeping.

GEORGE J. CARNEY (sworn).

(By Mr. BUTLER:)

Q. You were born in Lowell?
A. Yes, sir.
Q. And lived there all your life?
A. Yes, sir.
Q. What is your business?
A. My real business is treasurer for the Lowell institution for savings.
Q. How long have you been such treasurer?
A. Since 1869; assistant treasurer since 1859.
Q. Your father was then treasurer?
A. Yes, sir.
Q. He died and you succeeded him in 1869?
A. Yes, sir.
Q. Now, sir, whether at any time were you appointed to keep the accounts of the National asylum?
A. Yes, sir.
Q. Do you remember what time that was?
A. I think it was early in 1869.
Q. From that time, so long as I was president and acting treasurer, did you keep the accounts?
A. I did, sir.
38 Q. Did anybody else?
A. No, sir.
Q. With your accounts and account books did I ever interfere?
A. Never in any way whatever.
Q. Is that the asylum book (book handed witness)?
A. It is, sir.
Q. From the time that you commenced down to what date?
A. Down to September 11, 1880.
Q. Down to Sept. 11, 1880. Are all the entries there in your handwriting from the time you began?

A. Yes, sir.

Q. Before that there was somebody else?

A. Yes, sir.

Q. Will you run over that (the account for the fourth quarter of 1879, which was produced by Mr. Llufrio) and say in whose handwriting it is—who made it up?

A. The account is in my handwriting, sir.

Q. Will you state to me now whether the quarterly or yearly accounts submitted were all in your handwriting?

A. Yes, sir; I think without a single exception. I don't remember a single case where anybody else put pen upon paper.

Q. Will you look under November 20 and see if you find anything there?

A. I find under date of November 20 these two items: Paid Pitkin & Thomas—that I remember to have been a draft—$9,838; and paid to W. S. Tilton, $5,162.

39 Q. That making just $15,000?

A. Making just $15,000.

Q. Will you tell whether this (the account) is an exact transcript of your books?

A. I believe it to be, sir. Those two items are an exact transcript of the books, sir.

Q. Won't you run over and see if this is not made right up from the book?

A. It seems to be, sir.

Q. Turn to somewhere in May and see if you can *g*ind a charge to William S. Tilton of $15,000.

A. Yes, sir. May 6th, 1879, Gen. Tilton had $10,000, and on the same day he had $15,000 more.

Q. Ten thousand dollars and $15,000?

A. And $15,000.

Q. Can you tell me about what it cost a year to carry on the Eastern branch?

(Objected to and excluded.)

Gen. BUTLER: I will recur to that again by and by, with your honor's leave.

Q. Will you state how, in what manner, that money and all other moneys were sent to the governor of the home?

A. By a cashier's check on some national bank.

Q. What in all these cases accompanied the check?

A. An invoice.

Q. Was that invoice on a printed form, sir?

40 A. Yes, sir.

Q. That (exhibit invoice) was not a printed form?

A. No, sir.

Q. By whom were these invoices always signed, sir?

A. I cannot recall. My impression is that you signed invoices in blank and I filled them up. I think your signature was on them invariably.

Q. Now, Mr. Carney, I want to call your attention to about the 13th of October, 1879. If about that time you received anything from Mr. Tilton please state what.

A. I received that letter from him, sir.

Q. You are acquainted with his handwriting?

A. I believe that to be Tilton's writing.

Mr. SANGER: We admit that is Gen. Tilton's handwriting.

Mr. BUTLER: I proposeto read it:

"TOGUS, ME., *Oct.* 13, 1879.

Col. Geo. J. Carney, fin. ag't, Lowell, Mass.

MY DEAR COL.: The General has requested me to arrange for the settlement of the 15,000 which he loaned me for the purchase of leather. I enclose Gen. Butler's draft on you at sight for ---------- 9,838

And my treas. receipt ---------- 5,162

$15,000

The home owes me a balance of $5,985.81 on 30th Sept., '79, so the above balance (for which I send you regular treasurer's receipt in duplicate) will go far towards making us square on the ordinary home expenditures.

Yours truly, WM. S. TILTON, *Treas'r.*"

(Letter marked Exhibit K.)

41 Q. Did you answer that?

A. I do not believe I did answer it.

Q. What was the date of the next letter you did send him?

A. Nov. 15th—that is, October 13th.

Q. Didn't you write him in the meantime?

A. I think I did not. I don't find any memorandum of it, sir.

Q. Did you get another letter from him in the meantime?

A. Yes, sir; I think he wrote me Nov. 11th.

Q. Let me have that letter.

A. (Letter produced.)

Q. Did you send him any receipt for that draft?

A. No, sir.

Q. Enter it upon your books?

A. No, sir.

Q. The book of the asylum? The next letter which you received from him you think is the letter of Nov. 11th, 1879?

A. Yes, sir.

Mr. CUMMINGS: That is genuine.

Q. I want to go back to the time when you gave him the $15,000 in May. Did you receive any receipt for that $15,000?

A. Yes, sir.

Q. Show me that.

A. (Paper produced.)
Q. Is that in Gen. Tilton's handwriting?
A. No, sir; the signature is in his handwriting, and the words "account shoe shop" are in his handwriting. The rest of it
42 is filled up by some clerk, I think.
Q. Read it.
A. (Reading:)

"TOGUS, ME., *May 7th*, 1879.

"Receipt for money this day received from Gen. B. F. Butler, acting treasurer National Home for Disabled Volunteer Soldiers, fifteen thousand dollars ($15,000)."

"Remarks: On the first line, 'Account shoe shop,' in Gen. Tilton's handwriting. Then his clerk adds, 'Check 1st National Bank Lowell on 1st National Bank Boston, Mass.'

"(Signed) "WILLIAM S. TILTON,
"*Acting Treasurer.*"

(Receipt marked "Exhibit B.")

Q. Did you write him on account of that receipt?
A. Yes, sir.
Q. Hand me that letter, if you find it.
A. I hav-n't it.
Q. Have you a copy of it?
A. Yes, sir.
Q. A letter-press copy?
A. Yes, sir. I answered it May 7th as follows:

"MY DEAR GENERAL: In receipting to me for money please do not specify what use is to be made of it. A general receipt is all that I require for a voucher. This is in accord with Gen. Butler's views.

"Very truly, GEORGE J. CARNEY,
"*Financial Agent.*

"Gen. W. S. Tilton, Augusta, Me."

Q. Was that letter sent?
A. Yes, sir.
43 Q. Did you get a reply to it?
A. Yes, sir.
Q. Very good; let us have that.
A. Gen. Tilton replied to it May 29th.

Mr. CUMMINGS (examining letter): That is all right.

Q. Won't you read it, sir?
A. (Reading:)

"TOGUS, ME., *May 29th*, 1879.

Col. Geo. J. Carney, financial ag't, Lowell, Mass.

MY DEAR COL.: I enclose invoice of boots and shoes, amounting to $8,400, for which I would like the money. The General has

written you about it. The $15,000 last received I will treat as an addition to my appropriation.

Truly yours, WM. S. TILTON,
Deputy Gov."

(Letter marked "Exhibit L.")

Q. Do you find on your book that $8,400 he speaks of?
A. Yes, sir; I sent it to him June 13th in this letter.

(Objected to.)

CARPENTER, J.: It is wholly irrelevant. I do not undertake to say specifically why it is not relevant, but I take it to be something which tends to prove the recital of facts made by the defendant in opening to the jury, and that it is not to go beyond that. If that be so it is not relevant to this issue. The counsel might as well understand that nothing that has been opened by the defendant to the jury is, in my judgment, relevant to this issue. I state
44 it thus broadly lest the counsel might misunderstand or conceive that it was on any less broad ground, and perhaps it may save time. At all events, it will make any rulings that may be made as to testimony clearer.

Q. Did you receive any other letter from him about this $15,000 transaction?
A. Yes, sir. (Letter produced.)
Q. The question was not going over to November, but did you have any letters from him about the $15,000 in June or until after October?
A. No, sir.
Q. Now, then, you gave us a letter of November 11th; will you read that?
A. (Reading):

TOGUS, ME., *Nov.* 11, 1879.

Col. Geo. J. Carney, Lowell.

MY DEAR COL.: Will you send me invoice in duplicate of the sum of $5,162 of wh- I sent you duplicate on 13 Oct.?

Truly yours, WM. S. TILTON, *Treas.*

(Letter marked "Exhibit M.")

Q. Did you answer that?
A. No, sir; I think I did not.
Q. When did you write him next?
A. I think I wrote him next January 2nd, 1882.
Q. Pardon me; you mistake. You handed me a letter which is between that time. Did you write anything to him before that letter?
45 A. I think I did not.
Q. Is that letter from him?
A. I believe it is.
Q. Did you send any vouchers as requested?
A. No, sir. (Reading:)

BOSTON, *Nov.* 16, 1879.

MY DEAR COL.: The General informs me that you cannot understand my settlement of the 15,000 loan.

Of course the d'ft on yourself for 9,800 was as good as money to you. I was 500 short on my current account for the home's ordinary expenses, and I took the opportunity to reimburse myself by sending you a receipt for 5,200, more or less.

The General told me that I might take up the whole 15,000 to settle the thing up. I took only 5,000. He doesn't understand it as I fixed it, but you will. Please telegraph me on receipt of this whether you understand it or not; if not, I will come to Lowell, as he suggested to me. If you do, there is no need of my coming up. My address is 64 Warrenton St.

I can fancy your trouble. The 5,200 that I have taken was not included in your estimates. I had supposed it could be taken from any funds of the home in the General's hands. Please telegraph me at once.

Truly yours, WM. S. TILTON.

Col. Geo. J. Carney.

(Letter marked "Exhibit N.")

Q. What happened next?

A. I think I telegraphed him to come to Lowell. I think Gen. Tilton came to Lowell in answer to a telegram.

Q. Did he come to Lowell whether you telegraphed or not?

A. He did come to Lowell; yes, sir.

Q. Very well; won't you state what took place between you and Tilton relative to this $15,000 and the draft as part of the ac-
46 count? (Witness handed the blotter to Mr. Butler.) In the first place I want you to tell what he said to you and you said to him in substance as near as you can.

A. I can't remember, sir.

Q. At that interview, in consequence of what was said, did you make that entry in your book?

A. I did, sir.

Q. Won't you read it?

A. The entry is as follows, under date of Nov. 20th: National Home for Disabled Volunteer Soldiers to Benjamin F. Butler, to draft Pitkin & Thomas, $9,838; receipt, William S. Tilton, $5,162, making $15,000. This note comes at the bottom of this entry: "No money passes from George J. Carney to settle these. They offset an advance to Tilton for account of shoe shop, so Tilton says."

Q. Was that made at the time?

A. That was made at the time; yes, sir.

Q. Did Gen. Tilton afterward call on you to get a copy of your book?

A. Yes, sir.

Q. Did you give it to him?

A. I did; yes, sir.

Q. Of that book?

A. Of this book.

Q. This is under date of November 20th, 1879. In consequence of this transaction did you make the entry in the book of the National asylum which appears there?

A. I did, sir.

(Objected to.)

47 CARPENTER, J.: It is immaterial whether he ever made it unless he made it on the account to settle with the asylum, and the balance was turned over accordingly except the entry of May 10th showing the receipt of the money, and that I rule out as unnecessary, it being proved on one side and not denied.

Q. The entry is the same date, is it?

A. Yes, sir; Nov. 20th.

Q. Did you give him then any receipt?

A. I think not, sir.

Q. When next did you hear about this item?

(Objected to.)

CARPENTER, J.: I think it is not relevant to the issue; the answer would not be relevant.

Mr. BUTLER: I only want to fix a date and then see what he did hear.

CARPENTER, J.: I shall rule out anything, as I remarked before, whether it seems to be of much or little consequence; anything which is offered to prove the defence set up here.

Mr. BUTLER: I don't know, may it please your honor, I want to inquire whether he got any letter from Tilton; any other letter.

Mr. CUMMINGS: I object on the ground that it is of no consequence.

CARPENTER, J.: It comes under the same observation which I made before.

Mr. BUTLER: Very well. I should like to show how it was settled if I could, but I can't.

48 Q. Now, Mr. Carney, whether at any time in any settlement or any adjustment of your accounts—at all times, I should say—after this, did your books balance?

A. Yes, sir.

(Objected to.)

CARPENTER, J.: It is entirely irrelevant.

Mr. BUTLER: My brother opened expressly that they did not.

Mr. CUMMINGS: No; I did not. I opened that the account which was turned into the home appeared to balance; that is the way I opened it.

Mr. BUTLER: I want to know if his whole account balances, because it is said I must have known I had $15,000. I want to show—I will be frank about it, sir—I want to show, if I can, that no such balance as $15,000 appeared in any account of his.

CARPENTER, J.: Perhaps I might state the ground of my position

in the matter in another way. It seems to me perfectly clear, from the statements made here by the plaintiff and defendant, assuming them all to be true, that the controversy turns upon the propriety or impropriety of the manner in which the accounts were kept—that is to say, upon the question of whether the sum of money received has been properly entered in the account. Upon that I am entirely clear that the plaintiffs are right and that the defendant is wrong; that there has been a mistake and an error, and upon that theory I proceed in the admission of testimony, and both parties will have the benefit of an instruction to the jury to that effect.

49 It seems to me perfectly clear that the error—I think it is right I should say this—it seems to be a mere book-keeping problem not free from doubt. I say this not that it has any legal bearing, but from other considerations which you will understand, Mr. Butler. It seems to be a book-keeping problem, not free from intricacy, perhaps, to the general understanding or to the understanding of those who have not made themselves familiar with it. I am clear on the question myself in my own mind, and so far that I feel it my duty to make that statement to the jury as a deduction from the evidence, assuming that everything which has been said or offered to be said by any of these gentlemen who are concerned in the matter is perfectly true.

Mr. BUTLER: May I call the attention of the jury to these items?

CARPENTER, J.: Are those the items about which inquiry was made?

Mr. BUTLER: Yes, sir.

CARPENTER, J.: I think not. I think it is not relevant.

Mr. BUTLER: I mean these very items.

CARPENTER, J.: I take it for granted all along that nothing is offered to be proved except what has been opened to the jury.

Mr. BUTLER: Yes, sir.

CARPENTER, J.: That being so, I shall instruct them that nothing that has been offered is relevant, and that nothing that can be offered that does not go outside of the statement which was made in the opening of the case is relevant.

Mr. BUTLER: Now, I have but one other question, may it

50 please your honor. I desire on the question of the set-off to ask Mr. Carney to tell me, first, do these show all the disbursements and receipts, and how much they are?

Mr. CUMMINGS: I object to that for the reason I stated in my opening.

CARPENTER, J.: On what ground?

Mr. CUMMINGS: I object to it on the ground that the statute itself provides that no member of the home shall have compensation except for extra services, and that is to be determined by the board of managers, and the General in his opening said they never made any such determination.

CARPENTER, J.: I will hear the defendant on that question, as to whether it will be permissible to prove a set-off.

Mr. BUTLER: Your honor will save us an exception on that.

CARPENTER, J.: I say if it seems good to you I will hear you on the question.

Mr. BUTLER: Then I don't want at present anything more of Mr. Carney, and will allow him to be cross-examined and then will offer the set-off.

Mr. CUMMINGS: In the present state of the case I do not think we ought to cross-examine him. I do not think there is anything to cross-examine him upon.

CARPENTER, J.: I shall exclude any questions you may ask on cross-examination if they are objected to on the other side, on the ground that the main evidence is irrelevant, and therefore
51 cross-examination would be irrelevant. I do not mean to say you shall not cross-examine, but I mean to say that I should rule that way.

Mr. CUMMINGS: I will not cross-examine under the ruling of the court.

Mr. BUTLER: I want to call your honor's attention to the statutes a little more particularly. I have them in the records of the board of managers in a more convenient form than to hold up the Revised Statutes. I have all the statutes about the home here together. The third section of the act of 1866 provides "that the board of managers shall be composed of the President and Secretary of War and Chief Justice of the United States *ex officio* during their terms of office, together with nine other citizens of the United States not members of Congress, no two of whom shall be residents of the same State but who shall all be residents of States which furnished organized bodies of soldiers to aid in the late war for the suppression of the rebellion (no person being ever eligible who gave aid or countenance to the rebellion), to be selected by joint resolution of the Senate and House of Representatives immediately after the passage of this act. The term of office shall be for six years and until others are appointed in their places," etc. "New elections shall be made by joint resolutions of Congress, and vacancies by death, resignation, or otherwise to be filled in like manner. No member of the board of managers shall receive any compensation as
52 such member," etc. "But any member of the board having other duties connected with the asylum may receive a reasonable compensation therefor, to be determined by the board."

Section 4 and so on applies to other matters. Now, then, may it please your honor, on page 16 of the minutes of the meeting of the board of managers held on the 5th of Sept., 1867, is the following:

"The following resolutions were offered and adopted:

"Resolved, That Major General B. F. Butler be, and is hereby, appointed the acting treasurer of the board, and that he give bonds in the sum of one hundred thousand dollars; the said bond to be filed with the secretary of the board.

"Resolved, That the registered bonds of the asylum shall be delivered into the custody of Gen. Butler as acting treasurer of the board, to be held by him for the asylum until the election and qualification of a treasurer of the board."

The next page I offer is page 93. At a meeting held March 25, 1871, "Gen. Butler tendered his resignation as acting treasurer of the board, to take effect at the next meeting, which was laid on the table," and there is no further action by the board of managers upon the subject, and I remained during a time.

Now, may it please your honor, we went under the first act, which provides for a fund, until the amendatory act was passed, March third, 1875, and approved, which provides that thereafter the moneys shall be directly appropriated by the United States, the act being as follows:

(Act read.)

Now, then, may it please your honor, I suppose it to have been long ago settled that directors of ordinary or extraordinary corporations, without a by-law of the corporation to that effect,
53 cannot fix any compensation for any of their members for any service, because the court say it is open to a great many troubles. Now, then, I agree here is a permission for them to fix the services, but it is taken in connection with this, that any person, when called upon outside the duties of his office, his duties as member, not duties as an officer outside, to do other and different services beyond what would be as a member of the board of directors, may receive a reasonable compensation therefor, to be fixed by the board of managers. That is the proposition upon which my brothers rest.

Now, then, suppose the board of managers would not do it.

To illustrate, assume perversity, because it is of no consequence what, can they deprive a man of just compensation for services which he may have rendered simply by not fixing it? Can they stand in the way, or shall he have a fair *quantum meruit* for what he has done? Suppose, as in this case, it was a simple neglect—a neglect coming from the understanding at first, which I am bound to admit and do admit fully—that I would not out of this fund take any compensation for services. I tried to get out of the matter, but when the circumstances changed I think I was then entitled to compensation for services, and always expected that I should have it; for I did not see why I should work for the United States any more than any other person should work for the United States. I did see why I ought to eke out as much as possible a fund for these
54 disabled volunteer soldiers, and was willing to give my time and attention to it; but when circumstances changed, and whatever I might charge or what anybody else might charge would come from the whole people of the United States and would not diminish the soldiers' appropriation one hair, because it would go into the estimates by Congress, is there any reason or is there any law why in such a case one should not have a just compensation?

This matter has been discussed in a late work on corporations—the first volume of Morawetz on Corporations, section 508—and there the cases are cited, all except one, which I will give your honor, and this is what that authority says:

"It would be contrary to established principles to allow the directors or the agents of a corporation to fix their own compensation

for services rendered to a company. Directors are not entitled to any compensation for their official services as directors, unless the compensation is provided for by the charter or the by-laws adopted by the majority; but if a director is properly employed to perform services which do not pertain to his office as director he is entitled to such compensation as has been fixed upon or as the services are reasonably worth."

That covers, it seems to me, this exact point.

Then in the 30th of New Jersey Equity, 713, a case came up where none had been fixed—in equity, Gardner *v.* Butler *et al.* The question was whether there should not be an account given by him for money retained for his services, no compensation having
55 been fixed. He had retained as much as he chose. He was managing director from time to time, and the question was whether it should be retained. The court say:

"In Chandler *v.* Monmouth Bank it was held that a provision in the charter of a bank that no director should be entitled to any emolument, unless the same should have been allowed by the stockholders at a general meeting, was intended to prevent the directors from taking compensation for the performance of their appropriate duties, and that sound construction did not require the exclusion of the individuals of the board from just compensation for services of a different character because they were rendered while they were directors."

That was where the charter prevented the directors from fixing the compensation except by vote of the stockholders. The stockholders had fixed none, and the managing director had taken certain sums which he claimed for services and which the court in equity found just and reasonable, and they enunciated that proposition, may it please your honor.

The court in Gardner *v.* Butler, continuing, say:

"The prayer for an account was based on the claim that the salaries and commissions in question should be accounted for and repaid. There does not appear to have been any refusal to account for the transactions of the company at any time, and, except in connection with the salaries and commissions, there was no ground for praying for an account. That ground having failed, there will be no decree for an account."

Now, then, that is the ground of law upon which I humbly submit that the question of fair remuneration is a question for the jury, under such instructions and limitations as your honor will think the case requires.

Mr. CUMMINGS: Does the court desire to hear from us?

CARPENTER, J.: Oh, no; the testimony under a *quantum*
56 *meruit* to show the value of the services of the defendant as acting treasurer will not be admitted. To that ruling the defendant prays an exception, which is allowed.

FREDERICK SMYTH (sworn):

Mr. BUTLER: Shall I go further with Mr. Carney on the question of the book-keeping? Did I understand your honor to say that, it

appearing on our books we have taken it up and charged it, we are not at liberty to show that it was accounted for to the asylum?

CARPENTER, J.: No; I will repeat it. I should have been understood to say that if the testimony offered by you, and which was to be adduced in answer to the question asked by you, whatever it was, was to establish some allegation or offer of proof made by you in your opening to the jury, and went no further than that, and did not undertake to establish any allegation not offered to be proved by you in your opening to the jury, then, in that case, it is irrelevant to the issue and inadmissible.

Mr. BUTLER: I expressly opened to the jury that it had all been accounted for.

CARPENTER, J.: I did not so understand you.

Mr. BUTLER: I did, sir; and said that very account; and will your honor remember what I said exactly, that it had gone into the account; that the account had been audited and approved, and not a cent remained in my hands, as there would have been,
57 or in Mr. Carney's hands if there had been this $15,000. I said that.

CARPENTER, J.: I do not think such facts as that amount to a defence.

Mr. BUTLER: What—that it has been ultimately accounted for?

CARPENTER, J.: The statement that it is ultimately accounted for is a proposition of mixed law and fact.

Mr. BUTLER: I want to put in the facts upon that question.

CARPENTER, J.: You are to prove to the jury, and, of course, state in your opening, the facts which you are to prove. They are not legal conclusions. Of course, however proper it may be to advert to them as throwing light upon the nature and manner of the defence, they are not included in the propositions which you are going to sustain by proof. Legal conclusions cannot be sustained by proof or evidence offered in any case.

Mr. BUTLER: My proposition is that I did state the fact of accounting and the fact of paying over. I remember this phrase, that I paid the balance that was found due from me upon the accounts to my successor. If that is not opening, that I paid it and accounted for it, I don't know what it is.

CARPENTER, J.: I may, perhaps, be misunderstood. I mean to say that upon all the statements of fact made in the opening, and thereby offered to be proved to the jury, assuming them to be true, there is no defence whatsoever to this action, in my judgment, and I shall pass upon the questions of testimony in that view and shall so instruct the jury.

58 Mr. BUTLER: And will not permit me to come in and show that they were all accounted for?

CARPENTER, J.: If you wish to offer any testimony as to matters of fact beyond and outside of such matters of fact as were opened by you to the jury, I will hear a statement of what those matters of fact are and pass upon them. If there be nothing beyond that which it is now desired by you to offer, if there be nothing beyond that, then all parties have the benefit of my distinct ruling that

they are irrelevant, each and all of them, to this issue, and that they constitute no defence.

Mr. BUTLER: I still do not understand, sir. I now propose, may it please your honor, to offer to show by this witness, who was a member of the auditing committee of the accounts of the asylum, who examined all the receipts and all the expenditures and the vouchers, that all the moneys ever received by me as treasurer, including these, which were upon the same account, were duly accounted for, and then by another witness that they were paid over.

CARPENTER, J.: I judge that to be a mixed proposition of law and fact, and therefore not to be proved by witnesses or other evidence.

Mr. BUTLER: In order that I may not be mistaken I will say that I offer to prove that these very sums of money here in account were duly accounted for and paid over.

CARPENTER, J.: Do you propose to prove that by proving
59 any substantive facts other than those recited by you in your opening to the jury?

Mr. BUTLER: I have only to say that I did not open every item of evidence to the jury, as at the end of forty-six years of practice I have just learned I ought to. I now presume I ought to have done so.

CARPENTER, J.: Then it is necessary for you now to state what substantive fact you offer to prove which was not recited in your opening to the jury.

Mr. BUTLER: I do not offer any fact except the fact which I opened to the jury, that I had accounted for and paid over every dollar of money, including this money.

CARPENTER, J.: Then I tell you it will be irrelevant to the issue.

Mr. BUTLER: Your honor rules that it is irrelevant?

CARPENTER, J.: That is irrelevant.

Mr. BUTLER: I will have to ask your honor to save us an exception on that.

CARPENTER, J.: I noted an exception on that long ago at the request of the defendant. Mr. Johnson has observed every point wherein an exception ought to be noted, although, perhaps, you have not heard what has been said. Exceptions have been noted to the judgment upon the admissibility of evidence under a *quantum meruit*, and also to the judgment against the relevancy of the statement of facts, taken as a whole, which have been opened as constituting a defence.

60 Mr. BUTLER: I think the stenographer has it down. I offer to show we have accounted for this very money, and your honor rules I cannot. All right; I except.

CARPENTER, J.: There is nothing further, then, I believe, except the credibility of the evidence for the plaintiff. The credibility of the evidence of the plaintiff is the only question, I think, for the jury.

Mr. BUTLER: Now, if I can understand, the question for the jury is whether our account of this transaction, as matter of book-keeping, is a correct one, or——

CARPENTER, J.: No, sir; I shall instruct the jury on that in con-

tradiction of your view. The only question for the jury is the credibility of the evidence for the plaintiff. That, I suppose, is for the jury. I shall not instruct the jury that they must believe the witnesses for the plaintiff, as a matter of law.

Mr. BUTLER: Very well; I think I understand the matter now. (Addressing the jury:) This case, under the ruling of the court, gentlemen, comes down to a very fine point, but a very distinct one, and that is which, as to a matter of book-keeping, is to be believed—Mr. Tilton or——

CARPENTER, J.: Won't you kindly explain to him, Mr. Johnson? It is simply the credibility of the witness- as to the substantive facts stated by them, whether the things were done which they say were done, and as to the papers, whether they be genuine and whether they import the truth.

61 Mr. BUTLER: May I ask your honor to look at another matter? It is stated that these were taken in payment of the $15,000—that is the claim in the declaration—and that we had not accounted for them. Now, then, I propose to argue to the jury that these were not taken in payment for that; that they were taken on an entirely different account; that we refused to take them in payment; that Mr. Carney would not do it, and Mr. Tilton came up and it was agreed that they should be charged to Tilton, as we have charged them, and he took them up on his account, and therefore we charged them; and if he did not take them up on the account the testimony shows, first, that the draft was outside, so that the asylum got the benefit of that, and that is outside of your honor's ruling; and the very receipt was a receipt for $5,000, which would have been so much money, if we had agreed to it, paid over to him beyond the $15,000, if we had agreed to that, because he says, "I will send you my receipt on my appropriation," and he testifies that he did not take it up in his appropriation, but he promised to do so, said he would do so, and said I would permit him to do so—to take the whole amount up. Now, then, he draws a receipt on the appropriation, which we refuse to take for that, but which we would take if he might take the whole up on the appropriation—in fact, pay it back to him; that is what it amounts to. The only question is whether your honor will rule that that is such a payment that we cannot show that we did not receive it.

62 CARPENTER, J.: I must suppose I have not been heard, or, perhaps, have not been able to express myself with sufficient distinctness. I will repeat the ruling which I have made, that there is no question open to be argued to this jury or determined by them except the credibility of the evidence which has been put before the jury on behalf of the plaintiff.

Mr. BUTLER: And that our account of the transaction is not to be taken into consideration.

CARPENTER, J.: Your account of the transaction does not differ from the other account of it at all in its legal effect, as I understand it.

Mr. BUTLER: I beg your honor's pardon.

CARPENTER, J.: That is my ruling. I do not say it is so, I say I

decide it to be so, Mr. Butler, which decision I make peremptorily and conclusively in this action, and after which I apprehend it is not permissible to hold any further debate on either side.

Mr. BUTLER: Then, of course, there is nothing to argue to the jury.

CARPENTER, J.: It is for you to judge whether the question of the credibility of the evidence be worth arguing to this jury. I cannot determine for you.

Mr. BUTLER: Can I refer to the testimony on our side on the question of credibility?

CARPENTER, J.: Not at all, because the testimony does not differ. The single question is whether the evidence for the plaintiff, uncontradicted, is worthy of belief by the jury.

63

Mr. BUTLER: If I can't refer to my own testimony I don't want to argue anybody's else. I don't see anything to argue to the jury under your honor's ruling.

CARPENTER, J.: I ventured to suppose that would be your conclusion.

Mr. BUTLER: To which I except.

CARPENTER, J.: Do you make any claim for interest, Mr. Cummings?

Mr. CUMMINGS: We have one or two letters here of Gen. Butler's, showing that a payment was made——

CARPENTER, J.: It is altogether too late to put it in.

Mr. CUMMINGS: It is already in the case, my associate says. Interest from the date of the writ is satisfactory.

Charge to the Jury by His Honor Judge Carpenter.

Now, gentlemen, upon a consideration of all the evidence which has gone in here, I judge it to be my duty to give you one single, explicit instruction, which I venture to think, followed out by you, will enable you to find a verdict without serious difficulty. If you believe the evidence here presented—that is to say, if you believe the gentlemen who have been sworn as witnesses have stated the truth, and that the papers that have been produced are genuine and mean what they say, then the plaintiff is entitled to recover at your hands $15,000, with interest, simple interest, at six per cent. a year from the 17th day of March, 1885, down till to-day.

64

I ought to state that the statements made by the witnesses are not contradicted or offered to be contradicted by anybody. Therefore the simple question for you is whether they, standing before you and testifying to these facts and nobody contradicting them or undertaking to contradict them, are worthy of belief by you.

This is the only instruction, strictly speaking, which I need to give you, but I think I ought to make another observation, in view of the circumstances of the case, so that you may understand, in one respect, why I give you this instruction. There is no dispute between any of the witnesses who have been produced as to what were the facts about these transactions here in question. No wit-

ness contradicts another witness; no witness undertakes to modify anything which is said by any other witness. It appears, however, that, assuming all the facts to be as they are here stated by the witnesses, it was the opinion of the illustrious soldier who is now at the head of the Soldiers' Home and who has been a witness here, and of his associates, when they came into control of this property or trust, that in consequence of what had gone before there was a sum of money which ought to have been paid to the home or accounted for to the home by Mr. Butler, and which he had neglected to account for. There is no doubt upon the evidence that he had failed to account for it; that is a necessary conclusion. The ques-
65 tion is whether he was bound to do so.

Now, gentlemen, I think it right to state to you in the hearing of the parties here that whether he was bound to account for it or not is not a question entirely simple nor is it a question which an ordinary business man, without special examination, would feel himself competent to settle. It is not altogether improbable, gentlemen, that those of you who have not had occasion to look into books of account may have had some doubt in your own minds, as you have heard the evidence, perhaps, as to what the book-keeping controversy was and perhaps still more difficulty in settling it. It is my duty, however, in this present attitude of the case to look into the testimony, as I apprehend it, and determine that question, and I therefore instruct you that the right of the plaintiff to recover depends upon the fact that in the discussion or consideration of this book-keeping problem, which is the only controversy between the parties, apparently the Soldiers' Home is right and Mr. Butler, whom we used to call Gen. Butler, but who prefers he should be called Mr. Butler in court, is distinctly wrong on the question of book-keeping.

I need not say to you, gentlemen, that nothing has occurred in this testimony which in the slightest degree reflects upon the integrity or honesty or upright conduct of anybody who is concerned or who has been at any time concerned in this transaction. It is, as I have said, so far as the testimony goes here, a book-keeper's puzzle or problem, which, feeling clear what the right of the
66 matter is, I have judged it was my duty to take the responsibility of instructing you must be solved in favor of the plaintiff, The Soldiers' Home. Now, gentlemen, if you will be good enough to give the jury the papers, if they desire to see them, they may withdraw, if they have occasion to do so.

Mr. BUTLER: I want at the proper time, may it please your honor, to except to everything your honor has said upon the facts to the jury under our law.

CARPENTER, J.: Very good, sir. I added those observations in the public interest and, as the case is confused, in the interest of gentlemen who are concerned in the case.

Mr. BUTLER: I simply take exception.

CARPENTER, J.: I do not retract them. If they be ground of exception you have the benefit of it.

The jury found for the plaintiff in the sum of $16,537; and thereto the defendant excepted.

And the defendant prays that his exceptions may be allowed.

The foregoing exceptions are allowed and ordered to be filed as of December 3, 1886, before the jury left the bar.

G. M. CARPENTER, *J.*

67 It is thereupon considered by the court, to wit, May 14, A. D. 1886, that the said National Home for Disabled Volunteer Soldiers, plaintiff, recover of the said Benjamin F. Butler, defendant, the sum of sixteen thousand nine hundred and eighty-one dollars and twenty-five cents, damages, and its costs of suit, taxed at two hundred and sixty-three dollars and four cents.

A true record.

Attest: JOHN G. STETSON, *Clerk.*

68 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss.*:

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Saturday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and eighty-seven.

Before the Honorable Le Baron B. Colt, circuit judge.

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS, an Establishment and Corporation Duly Created and Existing under the Laws of the United States of America for the Care and Relief of the Disabled Volunteers of the said United States, and Having Its Principal Place of Business in the City of Hartford, in the State of Connecticut, Plaintiff,

v.

BENJAMIN F. BUTLER, of Lowell, in the County of Middlesex and Commonwealth of Massachusetts, Attorney and Counsellor at Law, but Having His Usual Place of Business in Boston, in the County of Suffolk and Commonwealth Aforesaid, Defendant.

In an action of contract.

69 At the October term of this court, A. D. 1886, on the fourteenth day of May, A. D. 1887, judgment on verdict was rendered in favor of the said plaintiff against the said defendant for the sum of sixteen thousand nine hundred and eighty-one dollars and twenty-five cents, damages, and two hundred and sixty-three dollars and four cents, costs of suit.

The aforesaid judgment was entered in this cause on the last day of the said October term pursuant to the general order of this court directing that judgment be rendered on all verdicts, nonsuits, and defaults where judgments were not previously rendered. Upon the entry of the said general order the court thereupon was adjourned *sine die* for the said October term.

On the said fourteenth day of October, after the adjournment of

this court as aforesaid, the defendant filed the following motion in arrest of judgment and plea to jurisdiction:

Motion in Arrest of Judgment. (*Filed May* 14, 1887.)

And now comes Benjamin F. Butler, defendant in said action at law, and moves the court here that judgment in said cause be arrested and the same be set aside, because that the Honorable George M. Carpenter, district judge of the district of Rhode Island, was not duly appointed a district judge to hold said circuit court for the October term, 1886, last past, nor does it appear by the record of said court that any appointment had been made or designation in due form of law given said Carpenter authorizing or requiring said term to be held or presided over by him, nor does it appear in and by said record that he had any authority or jurisdiction to hold
70 said court during said term wherein said action at law was heard and tried.

BENJ. F. BUTLER.

Plea to Jurisdiction. (*Filed May* 14, 1887.)

And now comes said defendant, Benjamin F. Butler, in his own proper person and pleads to the jurisdiction of this court as constituted to hear, try, or determine said cause because of the disability and disqualification of the Honorable George M. Carpenter, district judge of the United States in and for the district of Rhode Island, who, without due appointment or authority and without lawful right, presided over said circuit court at the term thereof commencing on the 15th of October, in the year of our Lord 1886, and, sitting alone in said court, undertook to hear and try said action at law.

Because said defendant saith that said Carpenter, district judge as aforesaid, was not duly appointed and authorized to hold said court or to try said cause therein, in that the Honorable Thomas L. Nelson, district judge of the United States in and for the district of Massachusetts, was duly commissioned and qualified as such district judge, and that said Nelson, district judge as aforesaid, was not prevented by any disability from holding any stated or appointed term of his district court in said district in the absence of the other judges at any time during the year 1886 and from thence up to the present time, and no disability was made to appear by the certificate of the clerk of said court, under the seal of said
71 court, to the circuit judge, or in his absence to the circuit justice of the circuit in which said district lies, being the district of Massachusetts, in said circuit.

And the defendant further says that Honorable Le Baron B. Colt was then and there duly commissioned circuit judge of said circuit court, with full power and authority to preside and hold any stated or appointed term of said circuit court, and was not absent from said circuit court, but, on the contrary, was present therein, and did hold said circuit court within said district from time to time during said term, and no designation or appointment made

by said circuit judge or justice of said circuit court was filed in the clerk's office and entered on the minutes of said district court, and no certified copy thereof, under the seal of the district court, was transmitted by the district clerk to any judge designated and appointed in the manner and with the powers provided in section 591 of the Revised Statutes of the United States, nor was any district judge of any judicial district within his circuit lawfully appointed to hold a district or circuit court in the place or in aid of any other district judge within the same circuit in manner aforesaid, and it was not and did not become the duty of said Carpenter, district judge as aforesaid, he not being a district judge so designated, to hold the circuit court during said October term, and he had no lawful authority so to do; all which said defendant is ready to verify; wherefore said defendant prays that all the proceedings in said action at law and all the orders, acts, and doings taken, had, or done in or about said action at law by or before said district
72 judge, Carpenter, in said circuit court while holding and presiding over said circuit court be reversed, set aside, and held for naught because of said disability and disqualification of said district judge to hold or preside over said circuit court during said term or any part thereof.

BENJ. F. BUTLER.

On the eighteenth day of May, A. D. 1887, the following motion was filed:

Motion for Stay of Execution. (*Filed May* 18, 1887.)

And now comes the defendant in the above action and moves that the execution in the above-entitled action may be stayed until the hearing of the motion in arrest of judgment and plea to the jurisdiction heretofore filed in said action, or until the further order of the court.

BENJ. F. BUTLER,
By E. M. JOHNSON, *Of Counsel.*

Which motion was thereupon allowed by the court.

On the twenty-ninth day of June, A. D. 1887, the following report was filed:

Report of Clerk on Taxation of Costs. (*Filed June* 29, 1887.)

A hearing upon the bill of costs, submitted in behalf of plaintiffs by George P. Sanger, plaintiffs' attorney, and hereto annexed, has been had before the clerk, George P. Sanger, Jr., appearing for the plaintiffs and the defendant appearing *pro se* and by his counsel, E. M. Johnson, Esquire.

73 No objections being made to any of the items of said bill except the item "Witness fees as per certificate filed, $279.65." I allow all the items of said bill except the said item which is objected to, a part of which item I allow, as hereinafter stated.

It is admitted that the certificates of the witnesses as to their travel and attendance are sufficient in form.

I annex a statement of the witness fees claimed, numbering the items 1 to 7, inclusive.

I state the defendant's objections to the allowance of said witness fees as follows:

(1.) No subpœna appears to have been served on any of the witnesses.

(2.) A witness is not entitled to fees for travel more than 100 miles each way unless a greater distance is travelled within the State by the most direct route from and to his place of residence; and if a greater distance than 100 miles is so travelled, he is entitled to fees for travel only for the distance travelled within the State.

(3.) John W. Llufrio is a clerk in the Second Auditor's office, where the accounts of the National Home for Disabled Volunteer Soldiers are audited. His testimony related only to papers and records of the Second Auditor's office, which papers and records ought not to have been brought here; but if the Government saw fit to direct Llufrio to bring them it should be at Government cost, and witness fees in favor of Llufrio should not be taxed against the defendant.

(4.) The Government supplies the money and audits the accounts of the National Home, and suit was brought by the district attorney. This case, therefore, being a Government case, no witness fees can be taxed except as they would be taxed were the United States the plaintiffs.

I make the following rulings on the above-stated objections:

1.

Under the authority of U. S. *v.* Sanborn, 28 Fed. Rep., 299, I rule that it is not necessary that a subpœna should issue and be served upon a witness to entitle him to travel and attendance.

2.

Under the authority of the same case above cited I rule that a witness is entitled to fees for travel for the distance travelled by him, five cents a mile from his place of residence to the place of trial and five cents a mile for returning to his place of residence.

74

3.

Under the authority of the same case I rule that John W. Llufrio is not entitled to witness fees in this cause. He was sent from the office of the Second Auditor in charge of papers belonging to the Government. His salary continued during his absence and he must obtain reimbursement for his necessary expenses in some other form than witness fees.

4.

I rule that this is not strictly a Government case. The National Home for Disabled Volunteer Soldiers is a corporation under the laws of the United States which manages its own affairs. It is true

its accounts are audited in the Second Auditor's office, but its officers are not officers of the United States and are not subject to the orders and control of any of the officers of the United States. The plaintiffs are entitled to costs in this case the same as any other corporation who may be entitled to costs in any case determined in the circuit court.

Pursuant to the above rulings, I disallow witness fees to John W. Llufrio, item 3, and allow all the other items of witness fees claimed by plaintiffs.

Deducting from the amount of the bill of costs presented by plaintiffs	$370 24
the witness fees claimed for Llufrio, item 3	107 20
the balance	$263 04

are the costs for plaintiffs taxed and allowed by me.

Respectfully submitted.

JOHN G. STETSON, *Clerk.*

75 *Plaintiffs' Costs.*

Writ & entry (entered in State court):

Tr., Oct. T., 1885, to Oct. T., 1886—		
3 terms, at $2.64	$7 92	
Att., 2 " " .33	66	
" Oct. T., 1886, trial list, 10 d's, at 33c.	3 30	
		$11 88
Continuance, 2 terms, at 30c.		60

Clerk's fees:

Fil.	$1 50	
D. E.	1 50	
D. F.	3 00	
Sw'r'g wit.	70	
Record	24 90	
		31 60
Attorney fee		20 00
Witness fees, as per certificate filed		279 65
Subpœna to witness		25
Marshal's fees on subpœna		5 30
		$349 28
Add costs in State court		20 96
		$370 24

Witness Fees Claimed.

Statement of attendance and travel of witnesses for plaintiff, as by accompanying certificates, to be taxed with costs.

		Residence.	No. days at 1.50.	No. miles at 5c.	Total.
Item 1	Wm. B. Franklin	Hartford, Conn.	2, $3 00	250, $12 50	$15 50
2	E. F. Brown	Dayton, Ohio	3, 4 50	1,747, 87 35	91 85
3	John W. Llufrio	Washington, D. C.	10, 15 00	1,844, 92 20	107 20
4	John Kirk	Togus, Me.	3, 4 50	354, 17 70	22 20
5	Augustus Thomas	Philadelphia, Pa.	3, 4 50	648, 32 40	36 90
6	Wm. S. Tilton	Boston	2, 3 00		3 00
7	Henry A. Piper		2, 3 00		3 00
					$279 65

GEORGE P. SANGER,
Plaintiffs' Attorney.

76 *Affidavit of William B. Franklin.* (*Filed June* 29, 1887.)

I, William B. Franklin, on oath depose and say that I am and for the past five years have been the president of the board of managers of the corporation that is plaintiff in the above-entitled case; that previous to the trial of the said case at the October term, 1886, of this court, at Boston, I was advised by plaintiff's counsel that it was necessary to have at the trial of said case in Boston a witness from the Second Auditor's office, in Washington, D. C., with the accounts of the above-named defendant in the matter of the said home on file in that office; that it was accordingly arranged with the said auditor that upon the plaintiff's request and at its expense John W. Llufrio, a clerk in said auditor's office, should come to Boston at the said trial as a witness and bring with him said papers; that said Llufrio did so come to Boston and testify as a witness in said case, and his expenses in so coming were paid by the plaintiff corporation.

W. B. FRANKLIN.

STATE OF CONNECTICUT, }
County of Hartford, } *ss*:

HARTFORD, CONN., *June* 27, 1887.

Then personally appeared the above-named William B. Franklin and subscribed the foregoing affidavit and made oath that the statements thereof are true, before me, a notary public, duly appointed and qualified.

[SEAL.]

FRANK E. HYDE
Notary Public.

77 This cause was thereupon heard by the court upon appeal from the taxation of costs as made and reported by the clerk.

On the said twenty-ninth day of June, A. D. 1887, the following motion was filed:

Motion for Execution. (*Filed June* 29, 1887.)

And now comes the plaintiff in the above-entitled case and prays that execution may issue therein against the defendant in due form of law.

NATIONAL HOME FOR DISABLED
VOLUNTEER SOLDIERS,
By GEORGE P. SANGER, *Its Attorney.*

On the fourth day of August, A. D. 1887, the court entered an order affirming the taxation of costs as made and reported by the clerk.

On the twenty-fourth day of September, A. D. 1887, this cause came on to be heard by the court upon defendant's motion in arrest of judgment and upon the plaintiff's motion for execution and was thence continued under advisement to this present October term, 1887, when, to wit, January 12, 1888, the opinion of the court is announced and an order is entered in accordance with said opinion, as follows: Motion in arrest of judgment overruled.

A true record.
Attest: JOHN G. STETSON, *Clerk.*

78 The following prayer for writ of error and assignment of errors was filed in the circuit court on the fifth day of March, 1888:

Circuit Court of the United States, District of Massachusetts, October Term, 1887.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS
v.
BENJAMIN F. BUTLER.

Prayer for Writ of Error and Assignment of Errors. (*Filed March* 5, 1888.)

And now comes the defendant in said action and prays for a writ of error to issue against the plaintiff, citing it, in due form of law, to appear at the Supreme Court of the United States, held at Washington, on the second Tuesday of October, 1888, and for errors in the process and proceedings of the circuit court, in the verdict and the judgment thereon, and the several rulings and orders and decision of said court therein, assigns the following:

1. The court erred in overruling and not granting the motion of the defendant to dismiss said cause for want of jurisdiction thereof.

2. The court erred in admitting in evidence the testimony of William S. Tilton, stating the contents of a draft of Pitkins & Thomas, which draft was not produced by the plaintiff, nor was notice shown to have been given to the defendant to produce the same, as set forth in the bill of exceptions in said cause.

79 3. The court erred in refusing to allow the statement by the defendant, who was acting for himself, to the court in the presence of the jury, the relation of Mr. Carney to the defendant and to the Soldiers' Home.

4. The court erred in ruling in, upon the motion of the plaintiff, the contents of a letter assumed to be dated May 23, 1880, the same not being produced and shown to be within the control of the plaintiff and no notice having been given to the defendant to produce it or a copy of it.

5. The court erred in ruling, after hearing the demurrer to the evidence, that the evidence was sufficient to sustain a verdict.

6. The court erred in ruling that the question whether the witness found on his book the 8,400 referred to in the letter of May 29, 1879, was wholly irrelevant to the issue, and, farther, in ruling that nothing had been opened by the defendant to the jury which was relevant to the issue.

7. The court erred in ruling that no testimony under a *quantum meruit*, showing the value of the services of the defendant as acting treasurer of the plaintiff corporation, was admissible.

8. The court erred in ruling that there was no question open to be argued to the jury or determined by them except the credibility of the evidence which had been put before the jury on behalf of the plaintiff.

9. The court erred in ruling that the defendant's account of the transaction did not differ from the plaintiff's account of it at all in its legal effect.

80 10. The court erred in instructing the jury that there was no doubt upon the evidence that the defendant had failed to account for the sum in controversy; that that was a necessary conclusion.

11. The court erred in instructing the jury that it was the duty of the court in the present attitude of the case to look into the testimony as he apprehended it and determine the question whether the defendant was bound to account for the sum in question; that the right of the plaintiff to recover depends upon the fact that in the discussion or consideration of this book-keeping problem, which is the only controversy between the parties apparently, the Soldiers' Home is right and Mr. Butler is distinctly wrong on the question.

"It is, so far as the testimony here goes, a book-keeper's puzzle or problem, which I, feeling clear what the right of the matter is, have judged it was my duty to take the responsibility of instructing you must be solved in favor of the plaintiff, the Soldiers' Home."

12. The court erred in sustaining the ruling of the clerk that the witnesses in this case were (under the authority of U. S. *v.* Sanborn, 28 Fed. R., 299) entitled to fees for travel for the distance travelled by them—five cents a mile from their places of residence to the place of trial and five cents a mile for returning to their places of residences.

13. The court erred in overruling the motion in arrest of judgment and in deciding that the judge who presided at the trial was

duly appointed and authorized to hold said circuit court in conformity to law.

81 14. The court erred in overruling defendant's plea to the right and authority of the judge who presided at the trial to so preside, and in holding that his appointment to hold the October term, 1886, of the circuit court of the United States for the district of Massachusetts was legally and properly made under the provisions of the Revised Statutes of the United States.

BENJ. F. BUTLER,
By E. M. JOHNSON,
Of Counsel.

82 The following is the opinion of the court in accordance with which the order was entered January 12, 1888, overruling the defendant's motion in arrest of judgment:

Circuit Court of the United States, District of Massachusetts.

No. 2558, law docket.

NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS
v.
BENJAMIN F. BUTLER.

Opinion of the Court (*January* 12, 1888).

COLT, *J.*:

The claim that the judge who presided at the trial was not duly appointed for that purpose is based upon sections 591 and 596 of the Revised Statutes, which, so far as they relate to this question, are as follows:

SECT. 591. Where any district judge is prevented by any disability from holding any stated or appointed term of his district court or of the circuit court in his district in the absence of the other judges, and that fact is made to appear by the certificate of the clerk, under the seal of the court, to the circuit judge, or, in his absence, to the circuit justice of the circuit in which the district lies, such circuit judge or justice may, if in his judgment the public interests so require, designate and appoint the judge of any other district in the same circuit to hold said courts, and to discharge all the judicial duties of the judge so disabled during such disability. Such appointment shall be filed in the clerk's office and entered on the minutes of the said district court, and a certified copy thereof, under the seal of the court, shall be transmitted by the district clerk to the judge so designated and appointed.

83 SECT. 596. It shall be the duty of every circuit judge, whenever in his judgment the public interest so requires, to designate and appoint, in the manner and with the powers provided in section five hundred and ninety-one, the district judge of any judicial district within his circuit to hold a district or circuit court in the place or in aid of any other district judge within the same circuit. * * *

The facts are that in pursuance of section 596 the circuit judge designated and appointed Judge Carpenter to hold the term of the circuit court in aid of the district judge for this district by an instrument in writing, duly signed, which instrument was filed in the office of the clerk of the circuit court. The defendant claims that the instrument of appointment should have been filed in the office of the clerk of the district court, and that the failure so to file it makes the appointment invalid and of no effect, so that the judge had no authority to preside in the circuit court.

It may be assumed, in the first place, that the appointment must be made or evidenced by writing, since it is directed that the "appointment shall be filed in the clerk's office." The provision in section 591 clearly provides, I think, that the filing shall be in the clerk's office of the district court. The words "of the said district court" limit the words "clerk's office" as well as the word "minutes." It therefore remains to ascertain the meaning and scope of the words "in the manner * * * provided in section five hundred and ninety-one;" or, in other words, to decide what things shall be done in order to comply with the requirements of section 596. While it would hardly be doubted that an appointment under section 596 should be in writing, still it seems to be evident that the language of the appointment should be different. Under section 591 the designation may be to hold both courts, while under section 596 it seems clear that the designation should specify whether
84 the judge appointed was to hold the circuit or the district court and whether he was to hold it in place of the judge of the district or in aid of him. There might be an argument that the words "in the manner provided," etc., should be construed as to the place of filing the paper to mean "in the manner *mutatis muntandis*," so that not only the words of the appointment, but also the place where it should be filed, should vary according to the circumstances and convenience of the case. Doubtless, as the plaintiffs contend, there must be some variation to meet the circumstances of the case; and perhaps, as to the place of filing, I might safely act on a presumption that the intention of Congress was to provide for filing the papers in what is obviously the most convenient place were it not for one provision in section 591. It will be seen that a judge appointed under section 591 may sit in the circuit court, although his appointment is filed only with the clerk of the district court. There is, therefore, no reason to think that the intent of the legislature will be contravened by such a practice under section 596. I am, therefore, inclined to think, although in my view it is not necessary absolutely to decide, that the designation should have been filed in the office of the clerk of the district court.

But I am of opinion that the failure to file the paper in the proper office does not invalidate the appointment. The provision is directory only. The language is that the "appointment" shall be filed, and this language alone, if there was no other considerations on either side, might be held sufficient to imply that the appointment is complete before it is filed. But the substantial ground of my conclusion is that the filing of the paper is not of the essence

of the act to be done, but relates solely to the manner of procedure. The essence of the act is the determination and decision on the part of the circuit judge, first, that the public interest requires that a judge be designated, and, secondly, that a particular judge
85 is selected for that purpose. The act of putting this on paper and signing it, if signature be necessary, is perhaps the last and essential element of that determination. The filing of the notice seems to have no office except to notify the clerk and the judge that the determination has been made.

Against this view of the scope and intent of the statute nothing can be found in the words of the statute itself. There is no prohibition against procedure otherwise than is directed. The provision that the circuit judge may "designate and appoint" is complete in itself, and the provision as to filing the appointment is afterwards added in separate sentences. There is nothing in the words or in their collocation which obstructs the separation of those provisions which appear to me non-essential and directory from those which are essential and mandatory. If it were held that the filing in the clerk's office is essential it would seem that there could be no escape from the conclusion that the sending of a copy to the designated judge is also essential. Such a conclusion would, as it seems to me, be absurd. For example, there might be a case in which the circuit judge had made his determination and appointment, had reduced his appointment to writing and delivered it to the judge therein appointed, and that judge had himself delivered the paper to the clerk of the district court and the clerk had filed and entered the same, and yet the authority of the judge would be incomplete because the clerk had not handed him in return a certified copy of the paper of appointment. This copy, it is observed, could serve no purpose except to notify him of that which he already knew, since there is no provision that he shall preserve it by way of evidence of the facts. I cannot think it safe to follow an argument which leads to such conclusions.

The motion in arrest of judgment is overruled.

86 UNITED STATES OF AMERICA, } ss:
Massachusetts District, }

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause entitled National Home for Disabled Volunteer Soldiers, plaintiff, *v.* Benjamin F. Butler, defendant, in said circuit court determined, and of all proceedings therein, including the opinion of the court on the motion in arrest of judgment and defendant's prayer for writ of error and assignment of errors filed therein.

In testimony whereof I hereunto set my hand and affix the seal of said circuit court, at Boston, in said district, this tenth day of April, in the year of our Lord one thousand eight hundred and eighty-eight, and of the Independence of the United States the one hundred and twelfth.

Seal of the Circuit Court, Massachusetts.

JOHN G. STETSON, *Clerk.*

87 (*Bond on Writ of Error.*)

Know all men by these presents that we, Benjamin F. Butler, of Lowell, in the district of Massachusetts, as principal, and Paul Butler and Prentiss Webster, both of said Lowell, as sureties, are held and firmly bound unto the National Home for Disabled Volunteer Soldiers, a corporation duly established by law, in the full and just sum of twenty-five thousand dollars, to be paid to the said National Home for Disabled Volunteer Soldiers, its successors or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the twenty-fourth day of January, in the year of our Lord one thousand eight hundred and eighty-eight.

Whereas lately, at a circuit court of the United States within and for the district of Massachusetts, in a suit depending in said court between the said National Home for Disabled Volunteer Soldiers, plaintiff, and the said Benjamin F. Butler, defendant, judgment was rendered against the said defendant, and the said defendant having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff, citing and admonishing it to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said defendant shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

BENJ. F. BUTLER. [L. S.]
PAUL BUTLER. [L. S.]
PRENTISS WEBSTER. [L. S.]

Signed, sealed, and delivered in presence of—
T. E. MAJOR.

Approved.
LE BARON B. COLT,
Circuit Judge.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

88 THE UNITED STATES OF AMERICA:

To The National Home for Disabled Volunteer Soldiers, an establishment and corporation duly created and existing under the laws of the United States of America for the care and relief of the disabled volunteers of the said United States and having its principal place of business in the city of Hartford, in the district of Connecticut, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within and for the district of Massachusetts, wherein Benjamin F. Butler, of Lowell, in the county of Middlesex and Commonwealth of Massachusetts, attorney and counsellor at law, having his usual place of business in Boston, in the county of Suffolk and Commonwealth aforesaid, is plaintiff in error and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Le Baron B. Colt, circuit judge of the United States for the first judicial circuit, this seventh day of April, in the year of our Lord one thousand eight hundred and eighty-eight.

LE BARON B. COLT,
U. S. Circuit Judge, First Judicial Circuit.

Service of the foregoing citation is acknowledged.

GEORGE P. SANGER,
Att'y for The National Home for Disabled Volunteer Soldiers, Defendant in Error.

Endorsed on cover: Massachusetts C. C. U. S. No. 170. Benjamin F. Butler, plaintiff in error, *vs.* The National Home for Disabled Volunteer Soldiers. Filed October 8, 1888.

Office Supreme Court U. S.
FILED.
JAN 20 1892

Supreme Court of the United States.

OCTOBER TERM, 1891.

No. 170.

BENJAMIN F. BUTLER,

Plaintiff in Error.

v.

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

In Error to the Circuit Court of the United States for the District of Massachusetts.

E. M. JOHNSON,

of Counsel for Plaintiff in Error.

BOSTON:
PRESS OF ROCKWELL AND CHURCHILL.
1892.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1891. No. 170.

BENJAMIN F. BUTLER, PLAINTIFF IN ERROR,

v.

THE NATIONAL HOME FOR DISABLED VOLUNTEER SOLDIERS.

BRIEF OF PLAINTIFF IN ERROR.

BRIEF STATEMENT OF THE CASE.

This was an action of contract originally commenced by the defendant in error in the Supreme Court of the State of Massachusetts, writ dated March 17, 1885, and removed to the Circuit Court of the United States for the District of Massachusetts, on petition of the plaintiff in error, by decree dated Oct. 13, 1885. The writ described the defendant in error as "An establishment and corporation duly created and existing under the laws of the United States of America for the care and relief of the disabled volunteers of the said United States, and having its principal place of business in the city of Hartford, in the State of Connecticut" (record, p. 2). The plaintiff in error is described as of Lowell in the county of Middlesex and Commonwealth of Massachusetts, etc. The declaration is, "And the plaintiff says the defendant owes it the sum of fifteen thousand dollars money had and received by the defendant to the use of the plaintiff as by the bill of particulars below, and interest thereon from Nov. 20, 1879."

The bill of particulars sets forth said sum of fifteen thousand dollars as "that amount of money of the plaintiff corporation loaned and sent by the defendant, then acting treasurer of said

corporation, on May 6, 1879, to Gen. Wm. S. Tilton, acting treasurer, eastern branch of said home at Togus, Maine, received there by said Tilton, May 6, 1879, and charged by the defendant as a credit in his account with the plaintiff. The said sum was repaid by said Tilton to said defendant Nov. 20, 1879, but said payment has not been accounted for in any way. The second count alleges that the defendant was treasurer of the plaintiff corporation from 1876 to 1882, and as treasurer, on May 6, 1879, loaned of the money and funds of the plaintiff to one W. S. Tilton the sum of fifteen thousand dollars; and on Nov. 20, 1879, said Tilton repaid the amount of said loan to the defendant, and the defendant received the same to the use of the plaintiff, and has never made over, paid, or accounted for the same to the plaintiff.

The defendant below answerd by a general denial, and pleaded the payment of all sums due the plaintiff at any time, and also filed a declaration in set-off (record, p. 5) in which he alleged that he was directed by the Board of Managers and Directors of said National Soldiers' Home to act as treasurer of said home, which it was not his official duty to do, and he continued to act as treasurer of said home until the expiration of his term of service as manager of said home; that the service was very onerous and responsible, and therein he collected, invested, reinvested, took charge of, and paid out very large sums of money, in the aggregate more than ten millions of dollars, and kept the funds and accounts, and examined the vouchers thereof; that he was relieved from that duty and service at his own request after he had ceased to be a member of said board; therefore he claims just and proper compensation for his service in that behalf.

The plaintiff answered the declaration in set-off (record, p. 8) admitting that the defendant acted as treasurer during the time he was a member of the Board of Managers, but denying that he had any legal claim for services as such treasurer or otherwise, and set up specially that there never was any agreement between the Board of Managers and the defendant that he should receive any compensation whatever for any services rendered, or duties performed by him, in connection with said corporation, and no salary or other compensation, therefor, was ever agreed upon, or fixed, or determined, by said board, and the defendant

never made any claim or demand upon the plaintiff for compensation for such services prior to the filing of said declaration in set-off.

On Nov. 29, 1886, the defendant below filed in the Circuit Court a motion to dismiss the action for want of jurisdiction apparent on the record (record, p. 8), which motion was heard by said Court on Dec. 2, 1886, and overruled, the Hon. George M. Carpenter, District Judge for the District of Rhode Island sitting, by assignment of the Circuit Judge.

At the trial on the said second day of December, 1886, and the day following, the plaintiff below introduced evidence that the defendant, as acting treasurer of the plaintiff corporation, paid to W. S. Tilton, manager of the Eastern Branch Home, the sum of $15,000 to be used for the purchase of leather for manufacturing boots and shoes, at said Eastern branch, and that the said sum was charged as so paid out in the defendant's account with the home; that on Oct. 13, 1879, said Tilton sent to the defendant in payment for said advance a sight draft for $9,838, drawn by the defendant on his financial agent and book-keeper, Geo. J. Carney, payable to the order of Pitkin & Thomas, and sent by defendant as acting treasurer to Pitkin & Thomas in payment of clothing furnished the home, and by Pitkin & Thomas endorsed and sent to Tilton in payment for boots and shoes purchased by them of said Tilton, and with said draft the said Tilton sent his own receipt for $5,162, making in all the sum of $15,000; that the draft and receipt were sent to said Carney, enclosed in a letter of date Oct. 13, 1879 (record, p. 9), and received and entered by said Carney on the defendant's account book kept by him, with the memorandum, "No money passes from G. J. C. to settle these. They offset an advance to Tilton." The plaintiff also showed that Tilton never "took up" on his regular account this $15,000 received May 7, 1879, and did not enter the payment on his accounts, but entered both transactions in his "shoe shop" books, and that this sum of $5,162 was never in fact paid to Tilton, but that Tilton subsequently received an invoice for this amount and charged the same in his regular accounts, the same as if it had been paid. The defendant's quarterly accounts as acting treasurer rendered to the Treasurer of the United States, for the quarter ending Dec.

31, 1879, showed no credit was given the home for the draft and receipt, but the home was charged under date of Nov. 20, 1879, with the payment to Pitkin & Thomas of the said sum of $9,838, and the payment to Tilton of said sum of $5,162.

The plaintiff offered two (2) letters from the defendant to Gen. Wm. B. Franklin, President Board of Managers National Home D. V. S., dated July 11, 1882, and April 13, 1883, respectively, in which the defendant speaks of his attention having been called to the discrepancy between his accounts and General Tilton's, and promises to have the books looked over to ascertain where the mistake was, if one existed; and on cross-examination a letter written by General Franklin, the then acting treasurer of the plaintiff, was produced, enclosing a statement from the second auditor, and requesting the defendant, if it should appear to him that this sum was due the United States or the home from him (defendant), to turn the money over to the writer, as if it was covered into the United States Treasury he knew no way in which the home could get it out again.

At the close of the plaintiff's evidence the defendant requested the court to rule that there was no evidence sufficient upon the pleadings to warrant a verdict for the plaintiff, on the ground that there had been no evidence that the draft and voucher had not been accounted for; but the court ruled that the evidence was sufficient to sustain a verdict, to which the defendant excepted (record, p. 12). The defendant below opened the defence to the jury in person, and stated that the National Asylum was incorporated in 1865, with a hundred incorporators; that the act was amended in 1866, so that the whole matter was put in the hands of a Board of Managers; that he was appointed president of the board; and that the homes were first supported by a fund obtained from pay due deserters and dead soldiers, money forfeited to Provost Marshalls and other sources. That the board established four homes for disabled soldiers, that no treasurer was elected, and defendant was appointed acting treasurer after some months, and served until he ceased to be president by the expiration of his term of office, and after that continued to act until the new Board of Management was organized. That the accounts of the several homes were kept at those homes, by their several

officers; that the duties of the general treasurer were to receive and invest any donations, to receive from the United States the moneys which should be required and invest them or keep them for the purpose of carrying on the homes, to pay the bills and distribute the money according to the appropriations, one-third each month of the regular appropriation, and for anything that might be required for the homes. The acting treasurer had only a cash account to keep, and he was given a clerk to aid him and to act as book-keeper. After 1871 the accounts were all kept by the book-keeper, Mr. Carney, and were from time to time audited as the Board of Managers saw fit, and were once audited by a Committee of Congress, which audited the books and certified to the correctness of the accounts; that the mode of entry would be substantially the moneys furnished by the Government on one side and on the other the charges of approved bills that had been paid. These bills were returned to the auditing committee and they audited the books. His books and accounts were audited, and in the course of the audit there was never one mistake found.

To employ the men at the Eastern Branch Home the managers resolved to establish there the manufacture of boots and shoes which might be exchanged or sold. On the strength of the resolution the president concluded to advance $15,000 as a loan to buy stock, and this $15,000 was sent and charged on the books, in the regular course of business. That in May, 1879, General Tilton sent to Mr. Carney a voucher for this money saying he had received it on account of shoe shop; to which Carney objected, stating that his receipt should not undertake to state any account for which he received money, because he kept no account except of cash sent; that a correspondence ensued between Carney and Tilton, and he (Tilton) received a letter from defendant saying he must adjust that matter of the shoe shop, and he thereupon sent Carney a draft from Pitkin & Thomas by which a payment had been made to them for some clothing, and sent his receipt that he had received $5,162, which made up the $15,000. Carney declined to enter that transaction on the books at that time and entered into a correspondence with Tilton about it; that Tilton claimed he wanted to take up a shortage in his accounts out of the shoe shop money, and he saw Carney on or about November 20, and after talking it

over Tilton said, "You can charge me with this draft and this receipt in any form you please and I will take it up on my general account," and thereupon Carney entered, on Nov. 20, 1879, Pitkin & Thomas' draft for $9,838, and Wm. S. Tilton's receipt for $5,162, making $15,000, in the account as money paid to Tilton, because his receipts show it was paid, and then, of course, this was to be audited in the accounts, that is, defendant's account stood as it should be, and went into the balances from time to time and was duly accounted for. On June 30, 1880, Tilton received an invoice for that amount ($5,162) in order to settle his accounts at the home, and the invoices were made in duplicate, one retained by Tilton and ons forwarded to Carney. That the defendent's term of service would have expired in April, 1880, but he held the position of acting treasurer at the request of the Board of Managers until September, 1881, when the accounts were audited by the Board of Managers and the balances turned over to General Franklin, and nothing was heard from it until 1882, when he was informed there was some discrepancy in his accounts. That he immediately examined his accounts and could find none, and was then informed that Tilton's accounts were short, and that Tilton claimed defendant had some money he had not given credit for. Tilton went to Lowell, saw the books, and made a copy of the entry on the book which contains the two items, but says that no money passed. The defendant then opened at length to the jury in regard to his claim for set-off.

The defendant called as his first witness George J. Carney (record, p. 20), who testified that he was treasurer of the Lowell Institution for Savings, and had been since 1869; that he was appointed to keep the accounts of the National Asylum in 1869, and that he kept these accounts while the defendant was its president and acting treasurer, and produced the accounts from the time he commenced down to Sept. 11, 1880, and identified the account produced by the plaintiff as in his handwriting, and stated that under head of Nov. 20, 1879, he found two items: "paid Pitkin & Thomas, $9,838," and "paid W. S. Tilton, $5,162;" that on May 6, 1879, there were two items, $10,000 and $15,000, charged to William S. Tilton, and identified a letter from Tilton dated Oct. 13, 1879 (record, p. 22), enclosing the draft of Pitkin & Thomas, and Tilton's receipt,

also a paper signed by Tilton, May 7, 1879 (record, p. 23), receipting for the $15,000 with the words "on account shoe shop;" also a letter from Tilton dated May 29, 1879, enclosing invoices for boots and shoes amounting to $8,400, and saying, "I will treat the $15,000 last received as an addition to my appropriation." All of which was read to the jury (record, pp. 23, 24). Upon the plaintiff's objection to the question whether witness found on his books the $8,400 spoken of in Tilton's letter, the judge ruled that it was wholly irrelevant, and further stated that in his opinion nothing that had been opened by the defendant was relevant to the issue (record, p. 24). The witness continued to testify without objection as to other correspondence with Tilton in relation to the $15,000 in question, and identified a letter from Tilton dated Nov. 16, 1879 (record, p. 25), in which Tilton says, "of course the draft on yourself for $9,800 was as good as money to you. I was $500 short on my current account for the home ordinary expenses, and I took the opportunity to reimburse myself by sending you a receipt for $5,200 more or less. The general told me I might take up the whole $15,000 to settle the thing up I took only $5,000 . . . . The $5,200 that I have taken was not included in your estimates, I had supposed it could be taken from any funds of the home in the general's hands." The witness testified that Tilton came to Lowell, and in consequence of the interview he made an entry in his book, charging the home with the Pitkin & Thomas draft and the receipt from Tilton of $5,162, making $15,000, and made a note at the bottom that no money passes to settle them, "they offset an advance to Tilton for account of shoe shop," so Tilton says. The witness was then asked, "when did you next hear about this item?" which was objected to, and the judge then stated that he should rule out anything, whether it seems to be of much or little consequence, which was offered to prove the defence set up here (record, p. 26). The judge, after stating his view of the controversy (record, p. 27) declined to allow the defendant to call the attention of the jury to the items, and stated that he took it for granted that nothing was offered to be proved except what had been opened to the jury, and on being answered by the defendant, "Yes, sir," stated that he should instruct the jury "that nothing that has been offered is relevant, and that nothing that can be offered

that does not go outside of the statement which was made in the opening of the case is relevant" (record, p. 27). The defendant then asked the witness if the books showed all the receipts and disbursments, how much they were; and on the plaintiff's objection, the judge heard the defendant on the question whether it was permissible to prove his claim in set-off, and after hearing the defendant, ruled that the testimony under a *quantum meruit* to show the value of the services of the defendant as acting treasurer would not be admitted, to which the defendant excepted. and the exception was allowed (record, p. 30).

The defendant swore another witness in his behalf, but before examining him asked the judge whether he should go further with Mr. Carney on the question of book-keeping, and in answer to the defendant's question the judge again stated that if the testimony went no farther than the statements of the opening it would be irrelevant and inadmissible. The defendant then stated to the court that he expressly opened that he had accounted and paid over; to which the court replied (record, p. 31) that assuming all the statements of fact made in the opening to be true, there was no defence whatever to this action in his judgment, and he should pass upon the questions of testimony in that view and so instruct the jury; that if defendant wished to offer any testimony as to matters of fact beyond and outside of such matters as were opened to the jury he would hear a statement of what those matters of fact were and pass upon then.

The defendant then stated he proposed to prove by the witness Smyth, that all moneys ever received by him as treasurer were duly accounted for, and by another witness that they were paid over. To which the court replied, "I judge that to be a mixed proposition of law and fact and not therefore to be proved by witnesses or other evidence."

The defendant thus offered to prove that these very sums of money here in account were duly accounted for and paid over. The court then said (record, p. 32), "It is necessary for you now to state what substantive fact you offer to prove, which was not recited in your opening to the jury." To which the defendant replied that he did not offer any fact except the fact which he had opened to the jury, that he had accounted for and paid over every dollar of money including this money.

To which the court replied then, it is irrelevant, and stated that an exception had been noted (record, p. 32.)

The court then said that the credibility of the evidence of the plaintiff was the only question for the jury, and ruled that the defendant's account of the transaction did not differ from the plaintiff's in its legal effect as he understood it, and ruled that the only question for the jury was whether the evidence for the plaintiff uncontradicted was worthy of belief, to which the defendant excepted.

The court then instructed the jury (record, p. 34) that if they believed the gentlemen who have been sworn as witnesses have stated the truth and that the papers produced are genuine and mean what they say, then the plaintiff is entitled to recover $15,000 and simple interest from March 17, 1885, to the date of the trial, and further instructed the jury that the statements made by the witnesses are not contradicted, or offered to be contradicted by anybody. Therefore the simple question is whether they are worthy of belief by you.

The court then added there is no dispute between any of the witnesses who have been produced as to what were the facts about these transactions here in question; no witness contradicts any other witness. Assuming all the facts to be as stated by the witnesses, it was the opinion of the illustrious soldier who is now at the head of the Soldiers' Home and of his associates when they came into control of the property or trust that in consequence of what had gone before, there was a sum of money which ought to have been paid to the home or accounted for to the home by Mr. Butler and which he had neglected to account for. There is no doubt upon the evidence that he had failed to account for it; that is necessary conclusion.

Whether he was bound to account for it or not is not a question entirely simple, nor is it a question which an ordinary business man without special examination would feel himself competent to settle. It is not altogether improbable that those of you who have not had occasion to look into books of account may have had some doubt in your own minds as to what the book-keeping controversy was, and perhaps still more difficulty in settling it. It is my duty, however, in this present aspect of the case to look into the testimony as I apprehend it and determine that question, and I therefore instruct you that

the right of the plaintiff to recover depends on the fact that in the discussion of this problem the Soldiers' Home is right and Mr. Butler is distinctly wrong on the question of book-keeping.

The Court further said, "I need not say to you, gentlemen, that nothing has occurred in this testimony which in the slightest degree reflects upon the integrity, honesty, or upright conduct of anybody who is concerned or who has been at any time concerned in this transaction. It is, so far as the testimony goes here, a book-keeper's puzzle, a problem, which, feeling clear what the right of the matter is, I have judged it was my duty to take the responsibility of instructing you must be solved in favor of the Soldiers' Home. The defendant excepted to everything the Court had said to the jury upon the facts.

The jury found for the plaintiff in the sum of $16,537.

After judgment, which was entered on May 14, 1887, the last day of the October term, 1886, and on the same day of the entry, the defendant filed a motion in arrest of judgment and a plea to the jurisdiction to the Court as constituted, both motions being based upon the ground that the Hon. George M. Carpenter, District Judge of the District of Rhode Island, was not duly appointed a District Judge to hold said Circuit Court for the District of Massachusetts for the October term, 1886, and because it does not appear by the record of said Court that said Carpenter had been appointed or designated in due form of law to hold or preside over said term, in that the Hon. Thomas S. Nelson, District Judge for the District of Massachusetts, was not prevented by any disability from holding any stated or appointed term of his District Court in said district in the absence of the other judges at any time during the year 1886, and from thence to the present time, and no disability was made to appear by the certificate of the clerk of said Court under the seal of said Court to the Circuit Judge or in his absence to the Circuit Justice of the Circuit in which said district lies; that the Hon. LeBaron B. Colt was duly commissioned Circuit Judge of said Circuit Court with full power and authority to preside and hold any stated or appointed term of said Circuit Court and was not absent from said Circuit Court, but on the contrary was present therein and did hold said Circuit Court within said district from time to time, and no designation or appointment

by said Circuit Judge or Justice was filed in the clerk's office, and entered in the minutes of said District Court, and no certified copy thereof under the seal of the District Court was transmitted by the district clerk to any judge designated and appointed in the manner and with the power provided in section 591 of the Revised Statutes of the United States, nor was any District Judge of any district within his circuit lawfully appointed to hold a District or Circuit Court in place or in aid of any other District Judge within the same circuit in manner aforesaid, and it was not and did not become the duty of said Carpenter, he not being a District Judge so designated to hold the Circuit Court during said October term, and prays that all orders, acts, and doings, had taken, or done in or about said action-at-law by or before said District Judge Carpenter he reversed and set aside and held for nought, because of said disability and disqualification of said judge to hold or preside over said Circuit Court during said term or any part thereof. These motions were heard before the Circuit Judge of the first circuit and on Jan. 12, 1888, he delivered an opinion overruling the motion in arrest of judgment (record, pp. 44, 45). In that opinion he stated (record, p. 45) that in pursuance of section 596, the Circuit Judge designated and appointed Judge Carpenter to hold the term of the Circuit Court in aid of the District Judge for this district by an instrument in writing duly signed, which instrument was filed in the office of the clerk of the Circuit Court.

After discussing the language of sections 591 and 596, the Court states that he is inclined to think that the designation should have been filed in the office of the clerk of the District Court (record, p. 45).

But the Court was of opinion that the failure to file the paper in the proper office does not invalidate the appointment. The provision is directory only. The language is that the "appointment" shall be filed, and this language alone might be held sufficient to imply that the appointment is complete before it is filed. The filing of the paper is not the essence of the act to be done, but relates solely to the manner of procedure. The essence of the act is the determination and decision on the part of the Circuit Judge, first, that the public interest requires that a judge be designated, and secondly, that a particular

judge is selected for that purpose; the act of putting this on paper and signing it is perhaps the last and essential element of that determination. The filing of the notice seems to have no office except to notify the clerk and the judge that the determination has been made. Against this view of the scope and intent of the statute nothing can be found in the words of the statute itself. There is no prohibition against procedure otherwise than is directed, the provision that the Circuit Judge may designate and appoint is complete in itself, and the provision as to filing the appointment is afterwards added in separate sentences; there is nothing in the words or their collocation which obstructs the separation of these provisions which appear to me nonessential and directory from those which are essential and mandatory, and overruled the motion in arrest of judgment.

Errors asserted and intended to be argued:

1. (5.) The Court erred in ruling after hearing the demurrer to the evidence that the evidence was sufficient to sustain a verdict.

2. (6.) The Court erred in ruling that the question whether the witness found on his books the $8,400 referred to in the letter of May 29, 1879, was wholly irrelevant to the issue, and in ruling that nothing had been opened by the defendant to the jury which was relevant to the issue.

3. (7.) The Court erred in ruling that no testimony under a *quantum meruit* showing the value of the services of the defendant as acting treasurer of the plaintiff corporation was admissible.

4. (8.) The Court erred in ruling that there was no question open to be argued to the jury or determined by them except the credibility of the evidence which had been put before the jury on behalf of the plaintiff.

5. (9.) The Court erred in ruling that the defendant's account of the transaction did not differ from the plaintiff's account of it at all in its legal effects.

6. (10.) The Court erred in instructing the jury "that there was no doubt upon the evidence that the defendant had failed to account for the sum in controversy; that that was a necessary conclusion."

7. (11.) The Court erred in instructing the jury "that it was

the duty of the Court in the present attitude of the case to look into the testimony as he apprehended it and determine the question whether the defendant was bound to account for the sum in question; that "the right of the plaintiff to recover depends upon the fact that in the discussion or consideration of this book-keeping problem, which is the only controversy between the parties apparently, the Soldiers' Home is right and Mr. Butler is distinctly wrong on the question. It is, so far as the testimony goes, a book-keeper's puzzle or problem which I, feeling clear what the right of the matter is, have judged it was my duty to take the responsibility of instructing you must be solved in favor of the plaintiff, the Soldiers' Home."

8. (13.) The Court erred in overruling the motion in arrest of judgment and in deciding that the judge who presided at the trial was duly appointed and authorized to hold said Circuit Court in conformity to law.

9. (14.) The Court erred in overruling defendant's plea to the right and authority of the judge who presided at the trial to so preside, and in holding that his appointment to hold the October term, 1886, of the Circuit Court of the United States for the District of Massachusetts was legally and properly made under the provisions of the Revised Statutes of the United States.

Pp. 42, 43, 44.

The plaintiff in error waives the 1st, 2d, 3d, 4th, and 12th assignments on the record.

The acts of Congress, relied on or referred to in the brief which are not inserted immediately in the brief, are printed at the end.

I.

As to the exclusion of all evidence offered or which could be offered under the defendant opening to the jury.

The errors assigned are to the rulings.

(6.) Nothing had been opened by the defendant to the jury which was relevant to the issue.

(8.) There was no question open to be argued to the jury or determined by them, except the credibility of the evidence which had been put before the jury on behalf of the plaintiff.

(9.) That the defendant's account of the transaction did not differ from the plaintiff's account of it at all in its legal effect.

The plaintiff below had rested his case and the Court had ruled that the evidence was sufficient to sustain a verdict (record, p. 12). The defendant opened the defence in person and at some length (record, pp. 12–20) and called his witnesses, and had examined one witness for some time. Upon the objection of the plaintiff below to an answer to the question "whether the witness found an entry on his books" (record, p. 24), the presiding judge ruled that it was wholly irrelevant, and further stated that nothing which had been opened by the defendant to the jury was in his judgment relevant to the issue. The evidence was continued without objection for some minutes, when the judge stated (record, p. 26) "I shall rule out anything, as I remarked before, whether it seems to be of much or little consequence, anything which is offered to prove the defence set up here."

Upon the plaintiff's objection to the question, whether at all times the books kept by the witness balanced, the Court said, "It seems to me perfectly clear from the statements made here by the plaintiff and defendant that the controversy turns upon the propriety or impropriety of the manner in which the accounts were kept; that is to say, upon the question of whether the sum of money received has been properly entered in the account. Upon that I am entirely clear that the plaintiffs are right and that the defendant is wrong; that there has been a mistake and an error *and upon that theory I will proceed in the admission of testimony*, and both parties will have the benefit of an instruction to the jury to that effect." The presiding judge then added that the error seemed to be *a mere book-keeping problem not free from doubt*, not free from intricacy, perhaps, to the general understanding or to the understanding of those who have not made themselves familiar with it. "I am clear on the question myself in my own mind, and, so far that I feel it my duty to make that statement to the jury as a deduction from the evidence assuming that everything which has been said or offered to be said by any of these gentlemen who are concerned in the matter is perfectly true." Record, p. 27.

The defendant below then requested permission to call the attention of the jury to the items about which the inquiry was made. To which the presiding judge replied, "I think not; I think it is not relevant;" and then said, "I take it for granted all along that nothing is offered to be proved except what has been opened to the jury;" and being answered, "Yes, sir," replied, "That being so, I shall instruct them that nothing that has been offered is relevant, and that nothing that can be offered that does not go outside of the statement which was made in the opening of the case is relevant."

On the question of set-off, the defendant below then asked witness to tell how much all the receipts and disbursements were, and upon objection of the plaintiff the presiding judge heard the defendant, and ruled that the testimony under a *quantum meruit* to show the value of the services of the defendant as acting treasurer would not be admitted (record, p. 30).

A new witness was sworn, Frederick Smyth (record, p. 30), and the defendant before proceeding to examine Smyth asked the presiding judge whether he understood the ruling to be that "it appearing on our books that we have taken it up and charged it we are not at liberty to show that it was accounted for to the asylum." To which the presiding judge said, "I should have been understood to say that if the testimony offered by you . . . was to establish some allegation or offer of proof made by you in your opening to the jury, and went no further than that, and did not undertake to establish any allegation not offered to be proved by you in your opening to the jury, then in that case it is irrelevant to the issue and inadmissible."

The defendant stated that he had expressly opened to the jury that it had all been accounted for, and stated further that he said to the jury that it had gone into the account, that the account had been audited and approved, and not a cent remained in his hands, as there would have been, or in Mr. Carney's hands, if there had been this $15,000. To which the presiding judge said, "I do not think such facts as that amount to a defence." The defendant then asked, "What, that it has been ultimately accounted for?" and the presiding judge

replied, "The statement that it is ultimately accounted for is a proposition of mixed law and fact."

The Court then repeated, "I mean to say that upon all the statements of fact made in the opening and thereby offered to be proved to the jury, assuming them to be true, there is no defence whatever to this action in my judgment, and I shall pass upon the question of testimony in that view, and shall so instruct the jury."

The presiding judge then said, "If you wish to offer any testimony as to matters of fact beyond and outside of such matters of fact as were opened to the jury, I will hear a statement of what these matters of fact are and pass upon them. If there be nothing beyond that which it is now desired by you to offer, . . . then all parties have the benefit of my distinct ruling that they are irrelevant each and all of them to this issue, and that they constitute no defence." The defendant then stated that he offered to show by the witness (Smyth), who was a member of the auditing committee of the accounts of the asylum, who examined all the receipts, and all the expenditures, and the vouchers, that all the moneys *ever received* by the defendant as treasurer, including these which were upon the same account, were duly accounted for, and then by another witness that they were paid over, to which the judge who presided said, "I judge that to be a mixed proposition of law and fact, and therefore not to be proved by witnesses or other evidence." The defendant then offered to prove "that these very sums of money here in account were duly accounted for and paid over," and on being asked if he proposed to prove that by proving any substantive fact other than those recited by him in his opening statement said, "I do not offer any fact except the fact which I opened to the jury that I had accounted for and paid over every dollar of money including this money," to which the presiding judge replied, "Then I tell you it will be irrelevant to the issue." "The defendant then said, "I offer to show we have accounted for this very money and Your Honor rules I cannot. All right, I except." The presiding judge then said, "There is nothing further, I believe, except the credibility of the evidence for the plaintiff. The credibility of the evidence of the plaintiff is the only question, I think, for the jury" (pp. 31, 32). The defendant then stated that he proposed to argue to

the jury that the $15,000 was not taken in payment for what it was claimed in the declaration, but on an entirely different account, that we refused to take them in payment, and that Tilton agreed to and did take them up on his account, and therefore they were charged, and if he did not take them up on the account the testimony shows that the draft was outside, so that the asylum got the benefit of that, and the receipt for $5,000 was drawn on the appropriation for Tilton, and which he said he did not take up, but promised to do so. Now, then, he draws a receipt on the appropriation which we refuse to take for that, but which we would take if he might take the whole up on the appropriation — in fact, pay it back to him, that is what it amounts to. The only question is whether that is such a payment that we cannot pay it back to him. In reply to this statement of the defendant the presiding judge ruled that there was no question to be argued to this jury or determined by them except the credibility of the evidence which had been put before the jury on behalf of the plaintiff.

And further ruled that the defendant could not refer to the testimony on his side on the question of credibility, because the testimony does not differ. The defendant then stated he did not see anything to argue to the jury under the rulings, and did not argue at all (record, p. 34), and the Court instructed the jury that if they believed the testimony of the plaintiff and no one had contradicted anything which had been said by the plaintiff's witnesses, they must find a verdict for the plaintiff.

No case has been found where the defendant after he had opened his case and begun the introduction of testimony without objection on the part of the Court or plaintiff, has been denied the right of completing his testimony, and of arguing to the jury upon the same.

"The Court has power to act upon *facts* conceded by counsel. If a doubt exists as to the statement of counsel the Court will withhold its direction, as where the evidence is conflicting, and leave the matter to the determination of the jury.

Oscanyan *v.* Winchester Arms Co., 103 U.S., 261.

But in this case the Court assumes that the controversy between the parties turned upon the propriety or impropriety

of the manner in which the accounts were kept by the defendant, and being clear upon that, that the plaintiff was right and the defendant wrong, proceeded on that theory in the admission of testimony and finally ruled all testimony offered by defendant irrelevant, and submitted the case to the jury with a substantial direction to find a verdict for the plaintiff for the amount claimed.

The case was to be tried upon the issue before the Court.

If the defendant had made no opening, then any evidence competent to show that the plaintiff never had a cause of action against the defendant would have been admissible.

Chambers County *v.* Clews, 21 Wall, 317.
Moran *v.* Eldred, 1 Wall, 231.

Did the defendant by his opening deprive himself of his right to introduce evidence for the consideration of the jury? The Judge below evidently considered the defendant's opening as an an admission of the plaintiff's claim. It was not so intended, but was a recital of the origin and methods of business of the National Home. On the question at issue the defendant stated (Record, p. 16) that Tilton sent Carney the Pitkin & Thomas draft and his (Tilton's) receipt for $5,162, to make up the $15,000, and that Carney declined to enter that transaction on the books at that time; that Tilton said he wanted it in a given way, because he was short in his accounts for the last quarter about $5,000, and he thought he could take that out of the shoe-shop money; that Tilton came to see Carney about the matter, and after a talk said to Carney, "Very well; you can charge me with this amount, this draft, and this receipt in any form you please, and I will take it up on my general account." Thereupon Carney entered the $15,000 in the account as money paid to Tilton, because his receipts show it was paid, and then, of course, this was audited in the accounts, that is my accounts stood as it should be and went into the balances from time to time, and was duly accounted for so far as I understand the account."

The defendant's contention on his opening was that Tilton wanted to make up a shortage of $5,000 on his general account out of the shoe-shop money, and that he, Tilton, was charged with the whole $15,000 at his request, which he promised to take up on his general account.

If the money for which it was claimed the defendant was liable was, in fact, charged to Tilton, and he gave a receipt for it, and it was so done because Tilton requested it to be done, then that would have been evidence for the jury to consider, upon the issue, and also upon the credibility of Tilton's testimony. This point was overlooked by the Judge.

2. The issue between the parties was not a book-keeping problem, nor did the question turn, as the Judge thought, on the propriety or impropriety of the method in which the accounts were kept.

The question was, "Was the defendant indebted to the plaintiff?" And the fact that he was not indebted could be shown in any manner independent of the books.

Entries on books are always explainable, and the truth of a transaction may be shown independently of them.

The Patapsco *v.* Boyce, 13 Wall, 329.

A settled account, if confined to particular entries, concludes nothing as to other entries not stated in it.

Judkins *v.* Hart, 11 Wheat., 237.

3. The evidence offered by the defendant below tended to sustain the statement in the opening.

The letter of Nov. 16, 1879 (Record, p. 25), written to Carney by Tilton, in reference to this matter, states: —

"I was short on my current account for the Home's ordinary expenses, and I took the opportunity to *reimburse myself* by sending you my receipt for $5,200, more or less. The General told me I might take up the whole $15,000 to settle the thing up. I took only $5,000. He doesn't understand it, as I fixed it, but you will. . . .

"I can fancy your trouble. The $5,200 I have taken was not included in your estimates. I had supposed it could be taken from any funds of the Home in the General's hands."

The receipt was for $5,200, more or less, to reimburse Tilton, who was short in his accounts. No money came for that. What the effect of this evidence was, as well as whether Tilton had receipted for the $15,000, on November 20, the date of the entry in Carney's books, was for the jury. If Tilton was responsible for the money in any form, so that it was to be ac-

counted for by him, and not the defendant, then the defendant was not liable to the plaintiff.

But the defendant also offered to prove by other evidence that he had accounted for and paid over every dollar of money, including this money, but the Court ruled that that fact would be irrelevant to the issue (Record, p. 32). It is difficult to see the ground for this ruling.

The plaintiff claimed that the defendant had received and had its money. The defendant offers to show he had accounted for and paid over every dollar of money, including the money claimed by the plaintiff to be in the defendant's possession.

Evidence which showed that the defendant had paid over and accounted for every dollar of money, if believed by the jury, would have warranted a verdict for the defendant. Evidence of that sort was relevant to the issue, and was properly applicable in determining the truth or falsity of the matter in issue between the parties.

That the money had been paid back to Tilton was competent. That Tilton had received it, and had not entered it on his accounts, was also competent.

The testimony of the witness Smyth that the defendant had duly accounted for all moneys received by him as treasurer, including the moneys in controversy between the parties, would have been competent.

The testimony of other witnesses that all money received by the defendant had been paid over, as directed by the plaintiff would have been competent. Yet all of this testimony was declared irrelevant, and ruled out, and the jury were not allowed to hear it, or to to weigh and consider the evidence that the defendant had introduced, without objection, before the ruling was made that all evidence was irrevelant.

If the Judge below believed that upon the face of the accounts the defendant was liable to the plaintiff in the sum claimed, there was the greater reason why he should allow the defendant an opportunity to explain the transaction by introducing any evidence which would show that notwithstanding the accounts he was not, in fact, liable for the same.

4. If the court below allowed the defendant to introduce a part of his evidence, before ruling that no evidence which could be introduced under his opening would be relevant to the issue, it

was then too late to exclude the evidence from consideration by the jury.

If the court believed that the plaintiff had made out a *prima facie* case, then it was the duty of the court to allow the defendant to meet that case by any evidence competent to the issue, without any opening of his side to the jury.

If the defendant had a right to introduce evidence without any opening statement of his position, by so opening he did not deprive himself of his right to put in evidence of other facts than those stated in the opening.

If he had that right, then the court below erred in ruling all testimony irrelevant because nothing that had been opened by the defendant to the jury was relevant.

The court undoubtedly might require the defendant to state what he expected to prove, and rule upon the admissibility of the evidence in the light of such statement, but to require a defendant to state to the jury all substantive facts he expects to prove and to exclude all testimony as irrelevant because the opening does not set out a state of facts which, if proved, will be a complete answer to the plaintiff's claim as the court understands it, and to rule that all evidence is to be excluded unless it is stated in substance to the jury beforehand, is compelling the defendant to try his case upon such opening statement instead of on the issue raised by the pleadings.

5. So far as the testimony which had been introduced by the defendant without objection is concerned, the court acted of its own motion in directing the jury to consider only the plaintiff's testimony, the plaintiff did not claim its privilege to have the testimony ruled on, it went into the case without objection, and should have been submitted to the jury under such instructions as the court saw fit under the circumstances. Evidence introduced without objection, cannot be stricken out of a case after it has been admitted, where no application has been made to the court to so strike it out, and the court acts of its own motion entirely.

Lewars *v.* Weaver, 121 Pa. St. 268.

In the case at bar the jury were instructed that nothing was to be considered except the plaintiff's testimony — which was in effect striking out all testimony that the defendant had offered.

II.

As to the defendant's declaration in set-off, which the court ruled was inadmissible, under a *quantum meruit* the plaintiff in error submits.

The statute creating the corporation, approved Nov. 21, 1866, § 3, provides as follows: "But any member of the Board having other duties connected with the Asylum may receive a reasonable compensation therefor, to be determined by the Board."

The defendant below (record p. 5) claimed that he was directed to act as treasurer by the Board of Managers, that the service was onerous and responsible, and that therein he took charge of, paid out, etc., etc., more than ten millions of dollars, and kept the records and accounts, and examined the vouchers thereof.

The defendant then had "other duties" connected with the Asylum, and under the statute was allowed to receive a reasonable compensation therefor, to be determined by the Board.

It is admitted that the Board never did determine any compensation for the defendant's services as acting treasurer. Did the failure of the Board to so determine render any claim for services inadmissible, as the court below ruled?

An action of *quantum meruit* lies, when a person employs another to do work for him without any agreement as to his compensation; the law implies a promise that the employer will pay him for the services as much as he may deserve or merit.

The law here implies directly that services such as are described are to be paid for, the amount due to be determined by the Board.

The question whether there was an implied contract was one of fact rather than of law: —

Bartlett *v.* Mystic River Corp., 151 Mass., 433;

and the question whether there was an implied contract to pay the defendant below for services rendered was a question which should have been submitted to the jury.

Sawyer *v.* Pawners Bank, 6 Allen, 207.

Pew. *v.* First National Bank of Gloucester, 130 Mass., 391, 5.

If the plaintiff shows that he has done all that he agreed to do, and that the defendant derived benefit therefrom, he is entitled to go to the jury as to the actual value of the services.

The Court below ruled that the testimony under a *quantum memit* to show the value of the services of the defendant as acting treasurer was inadmissible, but gave no reason for it.

Numerous authorities show that the defendent below would have been entitled to receive for his services whatever they were reasonably worth.

An officer of a corporation may recover compensation for services not strictly official.

Angel *v.* Ames, Corp., § 317.
Santa Clara Mining Co. *v.* Meredith, 49 Ind., 389.
Cheney *v.* Lafayette, etc., R.R., 68 Ill., 570.
Rogers *v.* Hastings, etc., R.R., 22 Minn., 25.

Even if the charter expressly forbids compensations for official services.

Chandler *v.* Monmouth Bk., 1 Green (N. J.), 255.
Henry *v.* Rutland R.R., 27 Vt., 435.

When the law required a bank to appoint a clerk, and the records showed his appointment, but did not show any fixed salary provided for him, he could recover for his services in *assumpit*.

Walker *v.* Bk. of Kentucky, 3 J. J. Marsh, 206.
Bill *v.* Darruth Valley R.R., 37 Eng. L. & E., 539.

III.

The Court erred in ruling after hearing the demurrer to the evidence at the close of the plaintiff's case that the evidence was sufficient to sustain a verdict.

The action is brought by the plaintiff below for money received by the defendant to its use.

To sustain the action it must appear that the defendant has received money, which, in justice and equity, belongs to the plaintiff, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff

Moses *v.* Macferlan, 2 Burr, 1005, 10.
Owen *v.* Challis, 6 C. B., 115.

The money must belong to the plaintiff.

Scarfe *v.* Hallifax, 7 Meeson & Wellsby, 288.
Barlow *v.* Brown, 16 Meeson & Wellsby, 126.

Under the provisions of the act, approved March 3, 1875, the money for the support of the National Home for Disabled Volunteer Soldiers was to be appropriated and drawn from the treasury of the United States "after direct and specific annual appropriations by law, in pursuance of quarterly estimates and upon quarterly requisitions, by the managers thereof, upon the Secretary of War, based upon such quarterly estimates for the support of said Home for not more than three months succeeding such requisition. . . .

"And the managers of said Home shall, at the commencement of each quarter of the year render to the Secretary of War an account of all their receipts and expenditures for the quarter immediately preceding, with the vouchers for such expenditures; and all such accounts and vouchers shall be authenticated by the officers of said home, duly appointed by said managers, and *audited* and *allowed* as required by law for the general appropriations and expenditures of the War Department." (Chap. 129, of 1875, U. S. Revised Stat., Supplement, Vol. 1, p. 155.)

The board of managers, selected by Congress, composed the corporation, the money which they expend was appropriated by Congress as a part of the expenses of the War Department. The managers make requisition on the Secretary of War for the funds, and render an account to him of the receipts and disbursements, and the accounts are audited and allowed as required by law for the general expenditures of the War Department.

The only duty charged by law on the corporation is to receive the money, expend it, and account to the government for its expenditures and receipts. The money does not belong to the board of managers, but to the government, and any accounting to the board, by its acting treasurer, is unnecessary; the accounting is with the Secretary of War, and the allowance or disallowance of the accounts of the board is to be determined by the Treasury Department of the government.

The money sued for never was the property of the plaintiff

below, and it had no right to it, or its use; it was intrusted to be expended for purposes set out in the statute which created it, and if it was not so expended, at the end of the quarter, it belonged to the government, and not to the plaintiff below, and any errors in book-keeping by which money appeared to be expended which was not in fact so expended, were errors by which the government and not the plaintiff suffered.

Indeed, this was the view of the president of the plaintiff corporation in the letter of March 29, 1883 (Record p. 11), as he says, "If you will turn it over to me I will receipt to you for it and take it up in my accounts. *This course will save the money to the home as if it is covered into the U. S. Treasury. I know no way in which the Home can get it out again.*"

The second auditor made a claim that $15,000 was due, in the final settlement of the account of the defendant below as treasurer of the plaintiff corporation.

The plaintiff corporation brought suit against the defendant, claiming that the money was due to it, and was received to its use, and to sustain that claim offered evidence to show a payment to Tilton by the defendant below, and a repayment by Tilton to the defendant below, and that no credit was given the plaintiff below for the repayment on the defendant's books and upon that evidence and a copy of the entry in Carney's cash-book, rested their case, as the record shows.

It did not appear that the former board of managers had not properly accounted for the money to the proper officers of the government, nor did it appear that the former board of managers had ever been charged with this amount in any subsequent quarterly appropriation so that they or the corporation, had any claim against the defendant by reason of having paid the same.

3. If it was money due the government then it was not due to the plaintiff below, and if it was the property of the government, the fact that the defendant below had paid it to the plaintiff, would be no defence to a claim against him by the government for the money.

Money received by one public agent from another public agent belongs to the United States, and the United States has the right to make the payee its debtor, and he cannot plead the statute of limitations against such claim.

United States *v.* Buford, 3 Pet., 12.

"United States Revised Statutes, § 277, ¶2:

"The second auditor shall receive and examine all accounts relating to the pay and clothing of the army, the subsistence of officers' bounties and premiums, military and hospital stores, and the contingent expenses of the War Department, etc., and after examination of such accounts he shall certify the balances and transmit such accounts with the vouchers and certificates to the Second Comptroller for his decision thereon.

"Revised Statutes, § 273:

"It shall be the duty of the Second Comptroller to examine all accounts settled by the Second, Third, and Fourth Auditors, and certify the balances arising thereon to the Secretary of the Treasury for settlement."

IV.

As to the instructions to the jury by the Judge:

"The Court instructed the jury that if they believed the evidence presented, then the plaintiff is entitled to recover at your hands $15,000 with interest at six per cent; stated to them that the statements made by the witnesses are not contradicted or offered to be contradicted by anybody; that there is no dispute between any of the witnesses who have been produced as to what were the facts about these transactions here in question; no witness contradicts another witness; no witness undertakes to modify anything which is said by any other witness." (Record, pp. 34, 35.) This instruction was given after the Court had ruled that the credibility of the *plaintiff's witnesses* was the only question for the jury, and had interrupted the defendant's argument by stating that the only question was the credibility of the evidence put before the jury on *behalf of the plaintiff* (Record, pp. 32, 33), and had refused to allow the defendant to refer to the testimony on his side in his argument. Again, stating, "The single question is whether the evidence *for the plaintiff, uncontradicted*, is worthy of belief" (Record, p. 34).

The defendant excepted to everything that had been said to the jury upon the facts (record p. 35).

This statement of the Court as to the testimony of the witnesses was not limited to the testimony of the plaintiff's witnesses alone in the instruction, but relates to all the testimony offered on both sides.

It was an instruction as to the sufficiency of the evidence which the Court should not, and indeed can not, give.

Canal Co. *v.* Knapp, 9 Pet., 541, 68.
Strother *v.* Lucas, 12 Pet., 410.

The Court, by its ruling that nothing was open except the credibility of the plaintiff's witnesses in effect, ruled out all the defendant's evidence, and then instructed the jury as if it had not been ruled out, that the testimony of the witnesses did not differ, after the testimony of all witnesses who could differ with the plaintiff's witnesses had been ruled out by the Court.

The Court cannot take from the jury the right of weighing the evidence bearing on controverted facts.

U.S. *v.* Tillotson, 12 Wheat., 180.
Scott *v.* Lloyd, 9 Pet., 418.
Gardner *v.* Babcock, 3 Wall, 240.
Mut. Life Ins. Co. *v.* Snyder, 93 U.S., 394.

The presiding judge had a right to express an opinion on the facts, if he stated no rule incorrectly, and *all matters of fact* are ultimately submitted to the determination of the jury.

Rucker *v.* Wheeler, 127 U.S., 85.
Williams *v.* Conger, 125 U.S., 397.
Lovejoy *v.* U.S., 128 U.S., 171.
U.S. *v.* Philadelphia & R.R. Co., 123 U.S., 113.

The Circuit Court has the power to direct a verdict for the plaintiff upon the evidence presented in a cause where it is clear that he is entitled to recover, and *no matter affecting his claim is left in doubt* to be submitted to the jury.

North Pa. R.R. *v.* Commercial Bank, 123 U.S., 727.
Anderson County Comm. *v.* Beal, 113 U.S., 227.

But this case differs from those above cited. All matters of fact were not submitted to the jury, and the verdict was directed upon the plaintiff's evidence alone.

The ruling of the judge that the defendant could offer no testimony under his opening which would be relevant to the issue, and his instruction to the jury that the testimony of all

the witnesses was the same in effect, are to be considered together, as the result to the defendant was that the action was determined against him, with no opportunity to have his evidence on the matter already offered, or which he was prepared to offer, submitted to the jury.

The question was not properly a question where *no matter affecting the plaintiff's claim* was left in doubt, or if it was, it became so only disregarding evidence which the defendent had put in, and refusing to allow him to introduce any evidence at all in defence. This is not what the Court intended should be the power of the judges under the ruling that he has power to direct a verdict.

All the evidence should have been admitted and then the Court could have ruled on the effect of the evidence. If upon all the evidence he had ruled that the plaintiff had a right to recover, then the ruling would have been based upon evidence presented.

The Judge in his charge states that there is no doubt upon the evidence the defendant has failed to account for the money. The question is whether he was bound to do so (Record, p. 35). But he had previously ruled that the fact that the defendant *had accounted for* and *paid over every dollar of money* including this money, was irrelevant to the issue, and excluded all the defendant's evidence whether already in, or offered to be put in, bearing on that fact (Record, p. 32).

The judge then proceeds to state that the question whether he (defendant) was bound to account for it or not, is *not a question entirely simple*, nor a question which an ordinary business man would feel himself competent to settle. He assumes that some of the jury may have had some doubt in their minds as to what the book-keeping controversy was, and perhaps still more difficulty in settling it, and states it to be his duty in the present attitude of the case to look into the testimony and determine the question, and instructs the jury that the right of the plaintiff to recover depends on the fact, that, in the consideration of this book-keeping problem, which is the only controversy between the parties apparently, the Soldiers' Home is right, and the defendant is distinctly wrong, *on the question of book-keeping*.

It is, *so far as the testimony goes here*, a book-keeper's puzzle,

or problem, which I have judged it was my duty to take the responsibility of instructing you, must be solved in favor of the the plaintiff, the Soldiers' Home."

The issue between the parties was "not free from doubt," "a problem in book-keeping," "a book-keeper's puzzle," which the Judge tells the jury it was his duty to solve himself, and having solved it in favor of the plaintiff, it was his duty to instruct the jury, must be solved by them in the same way.

The question, as it lay in the mind of the Judge when he charged the jury, was whether the defendant had kept his books correctly; but he ruled, just prior to the charge, that the only question for the jury was the credibility of the plaintiff's witnesses.

It would seem, if it was a book-keeping problem, that the Court should, at least, have allowed the defendant to finish the examination of the person who kept the books, before deciding that the defendant was wrong in his book-keeping, and that to rule the defendant was wrong in his book-keeping without hearing his evidence, or allowing him to show that he was not wrong, was not directing a verdict on the evidence.

But the controversy between the parties was not a book-keeping problem.

It was whether the defendant owed the plaintiff $15,000 or not, and that was a question which the solution of the problem in book-keeping could not determine, because while it was competent for the plaintiff to prove the entries made by the defendant in his books as admissions against his interest, the fact that those entries were relied on to establish the plaintiff's claim, made the testimony which the defendant was offering to put in, and which was refused as irrelevant, important for the consideration of the jury.

Any testimony to show he did not owe this money was competent under the issue. This has been already considered in another part of this brief.

But the Judge had no right to instruct the jury, as he did after ruling, that the only question to be determined was the credibility of the plaintiff's evidence. He was under no obligation to tell the jury why he gave them the instruction, but proceeds to do so, and it then appears that the Judge had made up his mind, from the plaintiff's evidence, and the defendant's

opening, and the testimony offered by the defendant, so far as he was allowed to go in introducing testimony, that the defendant had failed to account for the money, and that the difference between the parties was only a difference in the way the parties viewed certain entries in books kept by the defendant.

Had the learned Judge reached that conclusion, after hearing all the defendant's evidence, the defendant could not complain; but that he reached it after refusing to allow the defendant to show that he had accounted for and paid over this money for which he was sued, seems to be cause for complaint.

It was not a jury trial, the jury had no part in the matter, except to record the will of the Court.

The Court admits that the question as he viewed it is a puzzle or problem, not free from doubt, but because he is clear in his own mind that the defendant is wrong in his view of the problem, he directs the jury to find a verdict which gives the defendant no benefit of the doubt, and takes away his right to have the verdict of the jury upon a matter not free from doubt.

The plaintiff in error insists that there was a part of the little testimony which he was allowed to offer was admitted without objection, and being properly in the case which should have been considered by the jury; and that the Judge erred in disregarding it, and in allowing it to be disregarded by the jury; the testimony referred to is found in the two letters written by Tilton on May 29, 1879, the other Nov. 16, 1879, and found in the record, pp. 23 and 25. The letter of May 29 says, "The $15,000 last received I will treat as an addition to my appropriation."

The letter of Nov. 16, 1879: "The general told me I might take up the whole $15,000, to settle the thing up. I took only $5,000."

As a book-keeping problem these extracts throw light on the entries made by the witness Carney, and whether the money was taken up by Tilton on the shoe-shop books, or on his regular accounts, or not taken up at all, if Tilton had the money, or was in any way accountable for it to the plaintiff, that fact would have been competent as a defence to the claim that it was due from the defendant. If this money had been allowed as a payment in any accounting be-

tween Tilton and the plaintiff, then it would have been proper for the jury to weigh that fact. It certainly would have been but fair to the book-keeper, Carney, whose entries had created the puzzle or problem which the Judge found in the controversy, to allow him to testify fully as to these matters, and to show how, in his accounts, the matter had been entered so that not a cent remained in the defendant's hands as the defendant offered to do. (Record, p. 31.)

The power of the Court to direct a verdict upon the evidence means upon *all the evidence*, and not upon evidence for one side alone.

And the power to direct upon the evidence does not mean that the opening statement of the defendant's counsel is to be taken as evidence, nor that upon the statement of defendant's counsel as to the facts, the Court could rule that there was no evidence admissible.

That would be trying the case on the statements of counsel, and not on testimony under oath.

The defendant opened to the jury in person; but he stated that the accounts were kept by the clerk, and not by himself, and the statement of the defendant as to the accounts were not statements of facts within his own knowledge; he relied upon this clerk to show that the entries were correct and proper, and that nothing was due on the books; but the evidence was not admitted, on the ground that it was irrelevant to the issue.

V.

As to the motion in arest of judgment and plea to jurisdiction, filed May 14, 1887, based on the fact that the Honorable George M. Carpenter, District Judge of the United States for the District of Rhode Island, presided over the Circuit Court of the United States for the District of Massachusetts, without due appointment and authority and without lawful right, and sitting alone in said court, undertook to hear and try said action.

The thirteenth and fourteenth assignment of errors.

13. The court erred in overruling the motion in arrest of judgment, and in deciding that the judge who presided at the trial was duly appointed and authorized to hold said Circuit Court in conformity to law.

14. The court erred in overruling the defendant's plea to the right and authority of the judge, who presided at the trial, to so preside, and in holding that his appointment to hold the October Term, 1886, of the Circuit Court of the United States for the District of Massachusetts, was legally and properly made, under the provisions of the Revised Statutes of the United States.

The provisions of U. S. Rev. Stat. 591 and 596, so far as they relate to this question, are: —

Sect. 591. When any District Judge is prevented by any disability from holding any stated or appointed term of his district court, or of the Circuit Court in his district, in the absence of the other judges, and that fact is made to appear by the certificate of the clerk, under the seal of the court to the Circuit Judge, or, in his absence, to the Circuit Justice of the circuit in which the district lies, such Circuit Judge or Justice may, if, in his judgment, the public interests so require, designate and appoint the judge of any other district in the same circuit, to hold said courts, and to discharge all the judicial duties of the judge so disabled during such disability; such appointment shall be filed in the clerk's office, and entered on the Minutes of the said district court and a certified copy thereof, under the seal of the court be shall transmitted by the district clerk to the judge so designated and appointed.

Sect. 596. It shall be the duty of every Circuit Judge whenever, in his judgment, the public interest so requires, to designate and appoint, in the manner, and with the powers provided in Sect. 591, the District Judge of any judicial district within his circuit to hold a District or Circuit Court in the place or in aid of any other District Judge within the same circuit. . . .

The learned Circuit Judge, of the first circuit, appointed and designated Judge Carpenter to hold the term of the Circuit Court, in aid of the District Judge of the District of Massachusetts, by an instrument in writing, duly signed, which instrument was filed in the office of the clerk of the Circuit Court, in his opinion on the motion in arrest of judgment (on page 45 of the Record) he states that he is inclined to think the designation should have been filed in the office of the clerk of the District Court; but considers the provision as to filing to be directory only, the essence of the act to be done is the determi-

nation and decision on the part of the Circuit Judge, first, that public interest requires that a judge be designated, and secondly, that a particular judge is selected for that purpose. The filing has no office, except to notify the clerk and the judge that the determination has been made.

The plaintiff in error contends that the intent of the Revised Statutes of the United States, Sect. 609, that "Circuit Courts shall be held by the Circuit Justice or by the Circuit Judge of the Circuit or by the District Judge of the district sitting alone, or by any two of the said judges sitting together, is that the sessions of the Circuit Court in any district shall be presided over by one, at least, of the three persons, named in Sect. 609, that when the District Judge of any district is prevented by disability, from holding any stated or appointed term of the District Court, by an appointment filed in the clerk's office of the District Court, and entered on the Minutes of said court, the Circuit Judge or Circuit Justice may appoint the judge of any other district court in the same Circuit to hold said courts during such disability. Sect. 596 makes it the duty of the Circuit Judge, whenever in his judgment the public interests so require, to designate and appoint in the manner provided in Sect. 591, the District Judge of any judicial district within his circuit to hold a District or Circuit Court in the place or in aid of, any other District Judge within the same circuit.

It is therefore only when the District Judge is under disability, or the public interests so require, that the District Judge of any district goes into another district to hold court. In case of the disability of the District Judge, and an appointment made under Sect. 591, there can be no doubt that an essential requisite to the appointment of a judge of another district, appointed under that section, is that it should appear on the Minutes of the district court that he was so appointed and a certified copy of the appointment, *under the seal of the court*, shall be transmitted to the judge, so appointed, by the clerk of the District Court.

The statute requires (1) the appointment by the Circuit Judge. (2) filing that appointment in the clerk's office. (3) entry on the Minutes of the district court. (4) a certified copy thereof under the seal of the court, transmitted by the district clerk to the judge so designated and appointed. An appointment under

Sect. 596 is to be in the manner, and with the powers provided in Sect. 591.

A proper appointment requires that the judge, holding the court, should have a certified copy of the Minutes of the district court in relation to his appointment, *under the seal of the district court*, as his warrant for holding either the Circuit or District Court in any district, except the one for which he holds his commission from the President of the United States.

The learned judge, below, states, in his opinion, that the only essential thing in the statute is that the Circuit Judge shall determine that the public interest requires that a judge be designated; and, secondly, that a particular judge is selected for that purpose; that the act of putting it on paper, and signing it is the last and essential element of that determination; but it is submitted that the statute does not give the learned judge the right to appoint in any manner he pleases. It is only in the manner provided in Sect. 591, and in no other manner; and that manner requires that it shall be entered on the records of the District Court, a copy of the Minutes of the District Court in relation to such appointment under the seal of the court, transmitted to the judge so designated, and appointed; when he has that he is qualified to act, and without that he is not legally qualified to act, even if he has been appointed or designated by the Circuit Judge. It is no answer to the position of the plaintiff, in error, to say that there might be cases where the Circuit Judge, having made his determination and appointment, might himself deliver it to the judge selected; and the judge in turn might deliver it to the clerk who had filed and entered the same, and the Court does not think it safe to follow an argument which leads to the conclusion that the authority of the judge would be incomplete because the clerk had not handed the judge in return a certified copy of the paper of appointment. The manner in which a judge is to be appointed under Sect. 591 must be followed in any appointments made under Sect. 596, and unless it is so followed there has been no legal designation and appointment.

It was not followed in the appointment of Judge Carpenter to hold the Circuit Court for the District of Massachusetts for October term, 1886. The Circuit Judge appointed Judge Carpenter by an instrument in writing, duly signed, which instru-

ment was filed in the office of the Clerk of the Circuit Court. It was not entered on the minutes of the District Court, nor of the Circuit Court, nor was any copy thereof under the seal of any court transmitted by any one to the judge so appointed.

The word "shall" has never been construed as directory; it is mandatory always when used in a statute; while the word "may" in a statute has been construed to mean "must" or "shall" in several instances, no instance has been found in which the word "shall" has been construed to mean "may."

Congress has made a plain provision as to the manner in which the judge shall become qualified to act. There is no exception in the law, and if Congress makes no exception the court can make none.

Unless the court is prepared to say that nothing is necessary except the appointment itself, and leaves out as superfluous and unmeaning the words "in the manner and with the power provided" in Sect. 591, the ruling of the learned judge below was wrong, and he should have granted the motion in arrest of judgment.

When the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such case, there is no necessity for construction.

Thornley *v.* U.S., 113, U.S., 310.
Poor *v.* Considine, 6 Wall., 458.

Significance and effect shall, if possible, be accorded to every word of a statute. Every part of a statute must be so construed in connection with the whole as to make all the parts harmonize if possible, and give effect to each.

Washington Market Co. *v.* Hoffman, 101 U.S., 112.
Platt. *v.* U.P. R.R., 99 U.S., 48.

There can be no doubt that Congress intended that the appointment of any District Judge to hold Court outside his own district should be minuted on the records of the Court of the district in which the District Judge so appointed was holding either the District or Circuit Court, in place or in aid of the District Judge by law charged with the duty of holding said Court, and that the authority should be issued under the seal of the

District Court itself, and until the seal of the District Court was affixed to a certified copy of the minutes after appointment, no one could legally hold the office. Unless that was the intent, it is difficult to see why it was so worded.

If it was the intent, it is not to be construed as merely directory, but according to the intent of the legislature.

Binney *v.* Chesapeake & O. Canal Co., 8 Pet. 214.
Wilkinson *v.* Leland, 2 Pet. 627.
Priestman *v.* U.S., 4 Dall. 28.
U.S. *v.* Wiltberger, 5 Wheat. 76.

The Court below had no right to reject or disregard a material part of an Act of Congress unless it be so clearly repugnant to the rest of the Act that the whole cannot stand together.

Rice *v.* Minn. & N.W. R.R., 1 Black. 358.

The learned judge below regards the essence of the matter to be the exercise of the power of appointment on his part, and after that has been exercised, in effect the judge treats the rest of the statute as merely directory.

But the seal of the District Court in which he is to exercise the judicial power is required to authenticate and make valid the appointment by the Circuit Judge, and Congress has provided that that is the manner in which the appointment shall be made.

It is within the power of Congress to prescribe that such appointment must bear the seal of the District Court, and it has the effect of a writ or a process of the District Court, issued under its seal, and is, by virtue of the seal of the Court, entitled to obedience and respect. Without it, the act was irregular and informal.

The designation and appointment of the District Judge of any district to hold Court in place of or in aid of any other District Judge in the same circuit is not the appointment of that judge to any office, but only a selection of that judge to perform certain duties made incumbent on him by statute by virtue of the office he already holds. He does not become either *de jure* or *de facto* the District Judge of the district in which he

is directed to hold Court in aid of the judge of the district by that designation and appointment by the Circuit Judge. He is still the judge of the district for which he is regularly appointed, and retains all the powers in that district which he had before he was selected. The statute provides that in a certain manner he may be directed to hold Court in another district, and he so holds because it was contemplated by his appointment to the office of judge of his own district that he might be called upon if the Circuit Judge decided it for the public interest and designated or appointed him in the manner required by law. There cannot be an officer *de facto* unless there is some corresponding office, and no office was filled or could be filled by the designation and appointment of the Judge of the District of Rhode Island to hold the Court in Massachusetts in aid of the District Judge of Massachusetts who was the officer duly appointed and qualified to act and who was acting as the District Judge in his district; and the appointment of the Judge of the District Court of Rhode Island was *in aid of* the judge legally appointed to hold the Court in the District of Massachusetts.

The motion in arrest of judgment was made in the Court presided over and was heard by the Circuit Judge who made the order complained of.

It was not a collateral attack upon the right of the District Judge to hold the Court, it was a motion before the judge who made the order to revise and review his act in appointing the judge who presided at the Circuit Court for the October term, 1886. The judge had jurisdiction to review his own acts and did so review them and sustained the appointment for the reasons given in full in his opinion. If he had the power to appoint, he had the power to revise that appointment; if he had decided that he was wrong, then the question would have arisen whether the acts of the judge were valid as acts done *de facto;* but upon the record now before the Court the question has been decided in favor of the right of the Circuit Judge to appoint in the manner he did, and the statute has been construed to mean that an appointment may be made in the manner that this appointment was made and be valid in spite of the statute, that Judge Carpenter was judge *de jure*, not *de facto*. That the status of the judge who presided at the trial may be a matter of importance to the defendant below (the

plaintiff in error) is evident from the record, and he claims that he is entitled to the decision of the question whether such an appointment as was made in the case at bar was an appointment by which the judge of the District of Rhode Island held the Circuit Court of the United States for the District of Massachusetts for the October term, 1886, by authority of the statutes of the United States, or was there without right and was a judge *de facto* only.

BY E. M. JOHNSON,
of Counsel.

ACTS AND STATUTES REFERRED TO IN BRIEF.

THIRTY-EIGHTH CONGRESS, SESSION 2. CHAPTER 91, 1865.

An Act to incorporate a National Military and Naval Asylum for the relief of the totally disabled officers and men of the Volunteer Forces of the United States.

§ 1. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that Ulysses S. Grant, David G. Farragut, Hannibal Hamlin, Andrew Johnson, Salmon P. Chase, Edwin M. Stanton, Gideon Welles, John A. Dix, George Bancroft, William F. Sherman, John A. Andrew, Andrew G. Curtin, Oliver P. Morton, Benjamin F. Butler (and eighty-six others by name), and their successors, duly chosen, are hereby constituted and created a body corporate in the District of Columbia.

Approved March 3, 1865.

THIRTY-NINTH CONGRESS. CHAPTER 21, 1866.

An Act to amend an Act entitled "An Act to incorporate a National Military and Naval Asylum for the relief of the totally disabled officers and men of the Volunteer Force of the United States." Approved March 3, 1865.

§ 1. Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, that the President of the United States, Secretary of War, Chief Justice of the United States, and such other persons as from time to time may hereafter be associated with them, according to the provisions of this Act, are hereby constituted and established a board of managers of an establishment for the care and relief of the disabled volunteers of the United States army, to be known by the name and style of "The National Asylum for Disabled Volunteer Soldiers," to have perpetual succession with power to take, hold, and convey real and personal property, establish a common seal, and to sue and be sued in courts of law and equity; and to make by-laws, rules, and regulations for carrying on the business and government of the asylum, and affix penalties thereto: Provided that such by-laws, rules, and regulations are not inconsistent with the laws of the United States.

"SECT. 2. And be it further enacted that the business of said

asylum shall be managed by a board of twelve managers, who shall elect from their own number a president, who shall be the chief executive officer of the board, two vice-presidents, and a secretary, and seven of the board, of whom the president or one of the vice-presidents shall be one, shall form a quorum for the transaction of business at any meeting of the board.

"SECT. 3. And be it further enacted, That the Board of managers shall be composed of the president and Secretary of War, and Chief Justice of the United States, ex-officio, during their terms of office, together with nine other citizens of the United States, not members of Congress, no two of whom shall be residents of the same State, but who shall all be residents of States which furnished organized bodies of soldiers to aid in the late war for the suppression of the rebellion (no person being ever eligible who gave aid or countenance to the rebellion), to be selected by joint resolutions of the Senate and House of Representatives immediately after the passage of this act. The term of office shall be for six years, and until others are appointed in their places, after the first election, which shall be of three for six years, three for four years, and three for two years, to be determined by the order in which they shall be named in the resolution. New elections shall be made by joint resolution of Congress, and vacancies by death, resignation, or otherwise to be filled in like manner. No member of the board of managers shall receive any compensation as such member; but his travelling and other actual expenses while in the business of the asylum may be paid. But any member of the board having other duties connected with the Asylum may receive a reasonable compensation therefor to be determined by the board.

"SECT. 6. And be it further enacted, That the officers of the asylum shall consist of a governor, a deputy governor, a secretary, and a treasurer, and such other officers as the board of managers may deem necessary, to be appointed from disabled officers serving as before mentioned, and they may be appointed and removed from time to time as the interests of the institution may require, by the board of managers.

"SECT. 8. And be it further enacted, That the board of make an annual report of the condition of the asylum to Congress, on the first Monday of every January after the passage

of this act; and it shall be the duty of the said board to examine and audit the accounts of the treasurer, and visit the asylum quarterly.

Act approved, March 21, 1866.

CAAPTER 129 OF 1875. SUPPLEMENT OF REVISED STATUTES OF THE UNITED STATES, VOL. 1, P. 155.

An act making appropriations for the Legislative, Executive, and Judicial Expenses of the Government, for the year ending June 30, 1876, and for other purposes.

"That so much of the act entitled (1) 'An act to incorporate a National Military and Naval Asylum for the relief of totally disabled officers and men of the volunteer forces of the United States," approved March third, eighteen hundred and sixty-five, and of all acts amendatory thereof, as provides that for the support of said asylum there shall be appropriated all stoppages of fines adjudged against officers and soldiers by sentence of court martial or military commission, over and above the amounts necessary for the reimbursement of the Government or of individuals; all forfeitures on account of desertion from the service; and all moneys due deceased officers and soldiers which now are or may be unclaimed for three years after the death of such officers and soldiers" be, and the same is hereby, repealed, to take effect on and after the first day of April, eighteen hundred and seventy-five.

"And from and after April first, eighteen hundred and seventy five, no clerk shall be employed or paid in any department of the government for services rendered under any provision of said act of March 3, 1865, or the acts amendatory thereof.

"And from and after the first day of April, 1875, no money snall be appropriated or drawn for the support and maintenance of what is now designated by law as the "National Home for disabled volunteer soldiers," except by direct and specific annual appropriation by law.

"And it shall be the duty of the managers of said Home, on or before the first day of August in each year, to furnish to the secretary of war estimates in detail for the support of said home for the fiscal year commencing on the first day of July thereafter; and the secretary of war shall annually include such estimates in his estimates for his department.

"And no moneys shall, after the first day of April, 1875, be drawn from the treasury for the use of said home, except in pursuance of quarterly estimates for the support of said home for not more than three months next succeeding such requisition.

"And no money shall be drawn or paid upon any such requisition while any balance heretofore drawn or received by said home, or for its use, from the treasury under the laws now or heretofore existing, and now held under investment or otherwise, shall remain unexpended.

And the managers of said home shall, at the commencement of each quarter of the year, render to the secretary of war an account of all their receipts and expenditures for the quarter immediately preceeding, with the vouchers for such expenditures.

"And all such accounts and vouchers shall be authenticated by the officers of said home thereunto duly appointed by said managers, and audited and allowed as required by law for the general appropriations and expenditures of the war department.

ACT, 1878, SESSION 2. — CHAPTER 359.

Under the War Department. — Appropriation.

"Support of National Home for Disabled Volunteer Soldiers; current expenses, including repairs for the Central Branch, for the Eastern Branch, for the North-western Branch, for the Southern Branch, and for hospital and other necessary construction purposes, for clothing of extra sizes, and for underclothing, for outdoor relief and incidental expenses — eight hundred and eighty thousand dollars: Provided, that all purchases of supplies, exceeding the sum of one thousand dollars at any one time, shall be made upon public tender, after due advertisement; and, further, that Colonel Leonard A. Harris, of Ohio, General Richard Coulter, of Pennsylvania, and Colonel John A. Martin, of Kansas, be and they are hereby appointed managers of the National Home for Disabled Volunteer Soldiers, to fill vacancies occasioned by the expiration of the terms of office on the twenty-first day of April, Anno. Domini, eighteen hundred and seventy-six — of Lewis B. Gunckel, of Ohio, General James S. Negley, of Pennsylvania, and General John S. Cavender, of Missouri.

Approved June 20, 1878.

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Supreme Court U. S.
FILED,
JAN 25 1892
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1891.

BENJAMIN F. BUTLER, PLAINTIFF in error,
v.
THE NATIONAL HOME FOR DISABLED Volunteer Soldiers.
} Term No. 170.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE DEFENDANT IN ERROR.

WM. A. MAURY,
Assistant Attorney-General, and of Counsel for the National Home for Disabled Volunteer Soldiers.

Supreme Court of the United States.

OCTOBER TERM, 1891.

BENJAMIN F. BUTLER, PLAINTIFF in error, *v.* THE NATIONAL HOME FOR DISABLED Volunteer Soldiers.	Term No. 170.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE DEFENDANT IN ERROR.

The defendant in error, the National Home for Disabled Volunteers, a corporation existing by virtue of certain laws of the United States (Rev. Stat., § 4825), brought an action in the supreme judicial court of Massachusetts against the plaintiff in error on March 17, 1885, for the sum of $15,000 with interest thereon, the same being money had and received by him to the use of the defendant in error.

THE DECLARATION.

The declaration (p. 4) contains two counts. The first count avers that defendant, as acting treasurer of the Home, lent this amount of $15,000, on May 6, 1879, to

Gen. Wm. S. Tilton, acting treasurer of the Eastern Branch of said Home, at Togus, Me., and charged the same as a credit in his accounts with the plaintiff, and that the said sum was repaid by said Tilton to said defendant on November 20, 1879, but that said payment has not been accounted for by said defendant in any way, and that the said sum of $15,000 is due from the said defendant to the said plaintiff, with interest from November 20, 1879.

The second count is substantially the same as the first, except that it does not allege that the money was lent to Tilton as acting treasurer of the Eastern Branch of the Home at Togus, Me.

ANSWER.

The defendant's answer (p. 5) traverses each and every allegation in the writ and declaration contained.

SET-OFF.

The defendant also filed a declaration in set-off, wherein he claims "just and proper compensation" for his services as acting treasurer of the Home (p. 5).

REMOVAL TO UNITED STATES COURT.

On August 28, 1885, the defendant filed his petition (p. 6) for a removal of the suit to the circuit court of the United States for the district of Massachusetts, on the following grounds:

1. That the amount in controversy exceeds the sum of $500, exclusive of costs.

2. That the defendant was at the time of the commencement of the said suit and still is a citizen of the State of

Massachusetts, and that said plaintiff is not now and was not at the commencement of said suit a citizen of Massachusetts, but was then and is now a citizen of the United States and of another State of the United States than Massachusetts.

The petition was accompanied by the usual bond (pp. 6, 7).

AMENDMENT OF PETITION FOR REMOVAL.

On October 13, 1885, the defendant was allowed to amend his petition for removal by adding thereto the following words:

> That said plaintiff is a corporation organized and created by an act of Congress, and that said suit and the matters in dispute therein arise under the laws of the United States (p. 7).

ORDER OF STATE COURT FOR REMOVAL.

On the same day the State court made an order for the removal of the suit (pp. 8, 9).

ANSWER TO DECLARATION IN SET-OFF.

On May 12, 1885, the plaintiff filed an answer to the declaration in set-off (p. 8) admitting that defendant was for a time a member of the board of managers of the plaintiff, and acted as plaintiff's treasurer during such time, but denies that he has any legal claim for services as such treasurer or otherwise.

Plaintiff denies the existence of any agreement or understanding between said board of managers and the defendant that defendant should receive any compensation for any services or duties performed or to be performed by him in connection with the plaintiff corporation,

and avers that no salary or other compensation therefor was ever agreed upon or fixed by said board, and that defendant never made any claim or demand upon the plaintiff for compensation for such services prior to the filing of the said declaration in set-off.

And the answer concludes with a denial of each and every allegation in the declaration in set-off, "except as is otherwise herein expressly admitted."

MOTION TO DISMISS.

On November 29, 1886, the defendant moved to dismiss the action "for want of jurisdiction, apparent on the record" (p. 8).

This motion was denied on December 2, 1886 (p. 9).

TRIAL.

The cause came on for trial on the same day, before Judge Carpenter and a jury, and resulted in a verdict for the plaintiff for the sum of $16,537.50 (p. 9).

BILL OF EXCEPTIONS.

The defendant excepted to several rulings of the court in the progress of the trial.

The bill of exceptions (pp. 9–36) shows that on May 7, 1879, the defendant, who was then acting treasurer of the Home, paid to William S. Tilton, manager of the Eastern Branch Home, the sum of $15,000 for the purchase of leather, which was to be manufactured into boots and shoes at said Eastern Branch, and the defendant charged himself with the amount so paid out in his account with the Home (p. 9).

It further appeared that on October 13, 1879, Tilton paid said advance by sending defendant a sight draft for $9,838, drawn by defendant on his financial agent and bookkeeper, George I. Carney, payable to the order of Pitkin & Thomas, and sent by defendant, as such acting treasurer, to Pitkin & Thomas in payment for clothing furnished the Home. As Pitkin & Thomas were indebted to Tilton for boots and shoes purchased by them from Tilton, they indorsed and sent the draft to Tilton in payment.

At the same time as Tilton sent this draft to defendant he sent the following receipt:

TOGUS, ME., *October 13, 1879.*

Receipt for money this day received from Gen. B. F. Butler, acting treasurer of the National Home for Disabled Volunteer Soldiers.

WILLIAM S. TILTON,
Acting Treasurer (p. 9).

Both the draft and the receipt were inclosed in the following letter:

TOGUS, ME., *Oct., 13, 1879.*

Col. GEORGE I. CARNEY,
Financial Agent, Lowell, Mass.:

MY DEAL COL.: The general has requested me to arrange for the settlement of the $15,000 which he loaned me for the purchase of leather.

I inclose General Butler's draft on you at sight	$9,838
And my treasurer's receipt for	5,162
	15,000

The Home owed me a balance of $5,985.81 on 30th Sept., '79, so the above balance (for which I send you regular treasurer's receipt *is* [in] duplicate) will go far towards making us square on the ordinary Home expenditures.

WILLIAM S. TILTON,
Acting Treas. (pp. 9, 10).

Tilton never took up on his regular account with the Home the receipt of this $15,000, May 7, 1879, nor did he enter in that account the repayment thereof, but entered both transactions in his "shoeshop books."

Tilton's receipt for $5,162 was not preceded or accompanied by the payment of that sum to him by the defendant as acting treasurer of the Home, but the defendant gave Tilton an invoice for that sum in the same way as if he had paid the money to him.

Tilton took up the amount of the receipt on his regular account with the Home and accounted for it.

The defendant rendered his accounts quarterly, on the last days of December, March, June, and September, but in defendant's account for the quarter ending December 31, 1879, no credit was given the Home for the draft and receipt sent by Tilton, but the Home was therein charged, under date of November 20, 1879, with the payment to Pitkin & Thomas of said sum of $9,838 and the payment to Tilton of said sum of $5,162 (p. 10).

Plaintiff offered in evidence all the subsequent quarterly accounts of defendant, as acting treasurer of the Home, to show that no credit for the payment by Tilton was ever given, but "*upon defendant's objection the court excluded them as unnecessary*," saying, however, that defendant might himself introduce such subsequent accounts to show that he had accounted for said money after the proper quarter, if such was the fact (p. 10).

In defendant's account book, kept by Carney, there appeared in connection with the entry of the payment by defendant on November 20, 1879, of said sums of $9,838 and $5,162 to Pitkin & Thomas and Tilton, respectively, this memorandum, in Carney's writing: "No money passes for G. I. C. to settle these; they offset an advance to Tilton" (p. 10).

The plaintiff also introduced some correspondence between defendant and his successor in office, Gen. William B. Franklin, relating to the said transactions which needs not to be particularly set forth (pp. 10, 11).

At the close of plaintiff's evidence defendant requested the court to rule that there was "no evidence sufficient upon the pleadings to warrant a verdict, on the ground that there had been no evidence that the draft and voucher had not been accounted for," but the court ruled "the evidence sufficient to sustain a verdict," to which defendant excepted (p. 12).

Defendant opened the case very fully to the jury (pp. 12–20). He then introduced considerable evidence; but neither in his statement nor in his evidence did he offer to show any credit in his accounts to the Home for the payment made by Tilton. All that he did was to attempt to establish that, after a scrutiny of his own accounts, it did not appear that they were plus or minus $15,000, and that his accounts with the Home had been all duly audited and approved, and that he had accounted for all moneys that had come to his hands. But the court ruled that this evidence was irrelevant to the issue.

The following extract from the bill of exceptions shows very clearly the position of the court and the defendant with reference to the line of defense.

> Mr. BUTLER: I expressly opened to the jury that it had all been accounted for.
>
> CARPENTER, J.: I did not so understand you.
>
> Mr. BUTLER: I did, sir; and said that very account; and will your honor remember what I said exactly, that it had gone into the account; that the account had been audited and approved, and not a cent remained in my hands, as there would have been, or in Mr. Carney's hands if there had been this $15,000. I said that.

CARPENTER, J.: I do not think such facts as that amount to a defence.

Mr. BUTLER: What—that it has been ultimately accounted for?

CARPENTER, J.: The statement that it is ultimately accounted for is a proposition of mixed law and fact.

Mr. BUTLER: I want to put in the facts upon that question.

CARPENTER, J.: You are to prove to the jury, and, of course, state in your opening, the facts which you are to prove. They are not legal conclusions. Of course, however proper it may be to advert to them as throwing light upon the nature and manner of the defence, they are not included in the propositions which you are going to sustain by proof. Legal conclusions can not be sustained by proof or evidence offered in any case.

Mr. BUTLER: My proposition is that I did state the fact of accounting and the fact of paying over. I remember this phrase, that I paid the balance that was found due from me upon the accounts to my successor. If that is not opening, that I paid it and accounted for it, I don't know what it is.

CARPENTER, J.: I may, perhaps, be misunderstood. I mean to say that upon all the statements of fact made in the opening, and thereby offered to be proved to the jury, assuming them to be true, there is no defence whatsoever to this action, in my judgment, and I shall pass upon the questions of testimony in that view and shall so instruct the jury.

Mr. BUTLER: And will not permit me to come in and show that they were all accounted for?

CARPENTER, J.: If you wish to offer any testimony as to matters of fact beyond and outside of such matters of fact as were opened by you to the jury, I will hear a statement of what those matters of fact are and pass upon them. If there be nothing beyond that which it is now desired by you to offer, if there be nothing beyond that, then all parties have the benefit of my distinct ruling that they are irrelevant, each and all of them, to this issue, and that they constitute no defence.

Mr. BUTLER: I still do not understand, sir. I now propose, may it please your honor, to offer to show by this witness, who was a member of the auditing committee of the accounts of the asylum, who examined all the receipts and all the expenditures and the vouchers, that all the moneys ever received by me as treasurer, including these, which were upon the same account, were duly accounted for, and then by another witness that they were paid over.

CARPENTER, J.: I judge that to be a mixed proposition of law and fact, and therefore not to be proved by witnesses or other evidence.

Mr. BUTLER: In order that I may not be mistaken I will say that I offer to prove that these very sums of money here in account were duly accounted for and paid over.

CARPENTER, J.: Do you propose to prove that by proving any substantive facts other than those recited by you in your opening to the jury?

Mr. BUTLER: I have only to say that I did not open every item of evidence to the jury, as at the end of forty-six years of practice I have just learned I ought to. I now presume I ought to have done so.

CARPENTER, J.: Then it is necessary for you now to state what substantive fact you offer to prove which was not recited in your opening to the jury.

Mr. BUTLER: I do not offer any fact except the fact which I opened to

the jury, that I had accounted for and paid over every dollar of money, including this money.

CARPENTER, J.: Then I tell you it will be irrelevant to the issue.

Mr. BUTLER: Your honor rules that it is irrelevant?

CARPENTER, J.: That is irrelevant.

Mr. BUTLER: I will have to ask your honor to save us an exception on that.

CARPENTER, J.: I noted an exception on that long ago at the request of the defendant. Mr. Johnson has observed every point wherein an exception ought to be noted, although, perhaps, you have not heard what has been said. Exceptions have been noted to the judgment upon the admissibility of evidence under a *quantum meruit*, and also to the judgment against the relevancy of the statement of facts, taken as a whole, which have been opened as constituting a defence.

Mr. BUTLER: I think the stenographer has it down. I offer to show we have accounted for this very money, and your honor rules I can not. All right; I except.

CARPENTER, J.: There is nothing further, then, I believe, except the credibility of the evidence for the plaintiff. The credibility of the evidence of the plaintiff is the only question, I think, for the jury.

Mr. BUTLER: Now, if I can understand, the question for the jury is whether our account of this transaction, as matter of book-keeping, is a correct one, or——

CARPENTER, J.: No, sir; I shall instruct the jury on that in contradiction of your view. The only question for the jury is the credibility of the evidence for the plaintiff. That, I suppose, is for the jury. I shall not instruct the jury that they must believe the witnesses for the plaintiff as a matter of law.

It resulted, therefore, from the position of the court that nothing was open for the jury to pass upon but the credibility of the plaintiff's evidence, and the court having instructed them that the defendant had failed to account for the said sum of $15,000, and that it was his duty to account for it (pp. 34, 35), and having ruled out all evidence as to the defendant's offset, a verdict was returned for the plaintiff, as above stated.

On May 14, 1887, the defendant made a motion in arrest of judgment, based on a plea to the jurisdiction, filed on the same day (p. 37).

On January 12, 1888, the motion in arrest of judgment was overruled (p. 42), upon grounds fully set forth in an opinion of the circuit judge (p. 44).

ARGUMENT.

It does not seem to admit of doubt that the failure of the plaintiff in error to credit the Home with the $15,000 repaid to him as acting treasurer by Gen. Tilton made, necessarily, a difference of $15,000 against the Home in the balance turned over by Gen. Butler to his successor in office, Gen. Franklin.

If Tilton had paid back the $15,000 in gold it would have seemed a strange way of keeping books to omit to credit the Home by the payment. It is equally strange that the credit was not given, although no money passed from Tilton to Gen. Butler.

The sight draft for $9,838 was the equivalent of money. That draft had paid Pitkin & Thomas for clothing furnished the Home of the value expressed in the draft, and Pitkin & Thomas, being indebted for boots and shoes to the Eastern Branch of the Home, in charge of Tilton, paid that debt with the draft for $9,838 which they had received from Gen. Butler.

This transaction between Pitkin & Thomas and Tilton and Butler is similar to what is done in the clearing houses daily, to the extent of millions of dollars.

It would sound very strange in a clearing house to say that the sight draft held by Tilton, drawn as it was, against an existing fund, and representing, as it did, the value of the boots and shoes it had paid for, was anything but *cash*.

The same may be said of Tilton's receipt for $5,162, turned over by him to Gen. Butler with the draft to

make up the sum of $15,000. By this receipt Tilton acknowledged that he had received that amount of money from the acting treasurer of the Home, Gen. Butler, and placed himself under an absolute duty to account to the Home for that amount of cash received by him. The moment Gen. Butler received it he became chargeable for so much cash, and was in duty bound to credit the Home with it.

As the draft for $9,838 represented value received by the Home in the way of clothing, and as Tilton's receipt for $5,162 was properly accounted for to the Home as so much cash in his hands, it is clear that both of those sums must also be charged against the Home.

That it may be seen that a very substantial difference exists between the statement of the Home's account, made by Gen. Butler, and the statement as it should have been made, we will state the account both ways, and on the supposition that Gen. Butler was chargeable with the sum of $100,000 only.

GEN. BUTLER'S STATEMENT.

Dr.	*The Home, etc., in account with Gen. Butler.*	Cr.
To amount transferred to Tilton	$15,000	By cash on hand $100,000
To amount paid Pitkin & Thomas ..	9,838	
To amount transferred to Tilton	5,162	
Balance due Home	70,000	
	100,000	100,000
		Balance due Home 70,000

STATEMENT AS IT SHOULD HAVE BEEN MADE.

Dr.	*The Home, etc., in account with General Butler.*	Cr.
To amount transferred to Tilton	$15,000	By cash on hand $100,000
To amount paid Pitkin & Thomas..	9,838	Amount received from Tilton .$9,838
To amount transferred to Tilton	5,162	Amount received from Tilton . 5,162
Balance due Home	85,000	15,000
	115,000	115,000
		Balance due Home 85,000

It thus appears that according to Gen. Butler's mode of stating the supposed account he would have had $70,000 of cash on hand to turn over to his successor, whereas, according to the correct mode of statement, he should have had $85,000 of cash to turn over.

Gen. Butler does not deny that Tilton returned to him the $15,000. But Gen. Butler has wholly failed to charge himself with that amount of money.

There does not seem to be much of a puzzle about a case of that sort; for the moment gold is substituted for the draft and receipt all difficulty seems to vanish, and the theory of the court below appears too plain for argument.

It seems, therefore, to follow that by this mistake of Gen. Butler's bookkeeper he has failed to turn over to his successor a correct balance by the sum of $15,000.

Gen. Butler having confessedly received Tilton's draft and receipt, amounting to $15,000, *as cash*, and having confessedly failed to credit the Home by the amount so received, the court below was correct in ruling out any testimony not tending to show that such a credit was somewhere given in the defendant's accounts with the Home. No such evidence was offered, but in its place it was sought to show that the defendant had, in a general way, accounted for the moneys that had come to his hands as acting treasurer.

It was sought to show by the witness Smythe (p. 32) that he was a member of the auditing committee of the accounts of the asylum and examined all the receipts and all the expenditures and the vouchers, and that all moneys

ever received by the defendant as treasurer, "including these, which were upon the same account," were duly accounted for, and then by another witness that they were paid over. Here, then, was an attempt to settle *from the witness stand* the very question of law and fact that was to be tried. The defendant claimed that he had accounted for all moneys; but that was a manifestly untenable position so long as he could not show a credit in his accounts to represent the $15,000 paid by Tilton.

The court held the defendant down to this narrow issue, and would not allow the jury to consider any of his offered evidence, because it had no tendency to show that such a credit had been given.

So long as there was a failure to give that credit for $15,000, it seems futile to talk about all the money with which defendant was chargeable having been accounted for. The funds of the Home were turned over to defendant's successor to the extent of whatever balance was shown to be due by the Home's account with the defendant, and that account shows an error of $15,000 on the creditor side.

The action of the court was correct, unless it should have allowed the jury to be drawn away from the real issue in the case and become perplexed with the irrelevant testimony offered by the defendant.

THE SET-OFF.

The court was right in rejecting all evidence on this head, on the ground that the defendant in his opening statement to the jury disentitled himself to make any claim for compensation.

Section 4828 (Rev. Stat.) declares that no member of the Board of Managers of the Home shall receive compensation as such. But it authorizes payment of traveling and other actual expenses of a member, incurred while upon the business of the Home, and then it provides that "*any member of the Board having other duties connected with the Home may receive a reasonable compensation therefor, to be determined by the Board.*"

There is no pretense that the Board ever determined that Gen. Butler should receive compensation of any kind.

In his opening statement to the jury (p. 19) the defendant said:

> Well, now, I am going to be as frank about this as I have tried to be about the rest. I did not, gentlemen of the jury, when I accepted the office of acting treasurer, *mean or intend to take out of the funds for the relief of my comrades, the disabled soldiers, any money for my services, and I never have done it—never as such.* I attempted to get rid of the office, and, as I shall show you, sent in my resignation to the Board as acting treasurer, because it was an office in which I gave very large bonds, and in the meantime my occupation had changed, and it became very onerous to examine all manner of vouchers, and it became, too, a little troublesome, lest there should be mistakes made; but my associates, unfortunately for me, and I suppose the present Board would claim unfortunately for them, did not choose to permit me to resign. They laid my resignation on the table and desired me to go on; and I went on.
>
> But there was a change made which took effect in 1875. It being found very expensive for the Government to examine these rolls and employ so many clerks as were necessary (and, after all, the money had got to come out of the Government, because the Government had in its Treasury these forfeited funds, so that it didn't make any difference to them), Congress, after the board had reported three several times (for we were bound to report to Congress by law, with a copy of all our doings, every year), after three several recommendations of the board that the asylum be carried on by direct appropriations, Congress passed an amendatory act declaring that thereafterwards our business should be carried on by direct appropriations—that is to say, Congress each year would appropriate for carrying on our asylum as they would appropriate for carrying on this court, for instance, or the post-office, directly from the Treasury of the United States. I then thought that while I was willing to work for disabled soldiers without pay that I was not quite called upon to work for the whole United States without pay. Then my services would be for the benefit of the United States, and nobody else; *and I then determined in my own mind to have a salary*—not a salary, but a

compensation. I could not have a salary; I was not an officer in this regard, I was only acting treasurer.

But that thing, like every other, gentlemen, where men are very busy and only meet once in three months, and then have piled upon them an immense amount of business and are anxious to get away—*that question remained unadjusted by the Board, and I allowed it to stand unadjusted.* I nowhere signified and nowhere intended to signify my intention to give my services from the time when pay for my services would be drawn, not from the soldiers, but from the United States; and from that time I claim, in any event, fair and just compensation.

Gen. Butler having assumed the duties of acting treasurer without any intention of claiming compensation, and never having expressed a purpose to make such a claim, and having finally settled his accounts with the Home and retired from its service without making such a claim, and never having made such a claim until his declaration of offset was filed in this case, it may be said with some confidence that his own statement shows that the law will imply no assumpsit in any such case.

We apprehend, without multiplying authorities, that the law on this subject is properly stated in the case of *James* v. *O'Driscoll* (2 Bay., 103) where the court laid it down "as correct law:"

That all contracts must be good or bad in their original creation, and must not depend on subsequent contingencies; that is, whether the party chose to make it a gift or a charge at a future day or not. That it will never permit a friendly act, or such as was intended to be an act of kindness or benevolence, to be afterwards converted into a pecuniary demand; it would be doing violence to some of the kindest and best effusions of the heart to suffer them afterwards to be perverted by sordid avarice. Whatever differences may arise afterwards among men, let these meritorious and generous acts remain lasting monuments of the good offices intended in the days of good neighborhood and friendship; and let no after circumstances ever tarnish or obliterate them from the recollection of the parties. See also 2 Pars. Cont., pp. 54-59.

IS THIS SUIT MAINTAINABLE BY THE PLAINTIFF.

It is contended on the other side (brief, p. 23, etc.) that this action for money had and received is not maintainable be-

cause, it is said, the Home is a mere agency for the disbursement or application of moneys appropriated by the United States for the benefit of disabled volunteer soldiers and that the money here demanded is money had and received to the use of the United States if recoverable at all.

But the defendant having received the money as the acting treasurer of the Home, and having undertaken to account for it to the Home, he is now *estopped* to set up that it was not the money of the Home.

In this respect the relation of bailor and bailee and depositor and depositary of money is analogous to that of landlord and tenant (Bigelow on Estoppel, p. 548, Fifth Ed., and cases cited).

In *Seneca* v. *Allen* (99 N. Y., 532, 539), it was held that a county treasurer could not set up as a defense the invalidity of the act under which he received the money sued for and on that ground claim to retain it for himself, as against the party for whose benefit he received it. To the same effect is the case of *Perryman* v. *Greenville* (51 Ala., 507).

Nor can it be denied that payment of the $15,000 by Gen. Butler to the Home would be a complete discharge to him.

By section 4825 (R. S.) The National Home for Disabled Volunteer Soldiers is made a body corporate "with powers to take, hold, and convey real and personal property, establish a common seal, and to sue and be sued in courts of law and equity, and to make by-laws, rules, and regulations, not inconsistent with law, for carrying on the busi-

ness and government of the home, and to affix penalties thereto."

By section 4831 (Rev. Stat.) the National Home, etc., is authorized to receive donations of money or property, "*and to hold or dispose of the same for its sole and exclusive use.*"

Under this section the National Home, etc., has acquired a considerable amount of property which it holds without any accountability to the United States whatever.

But the $15,000 due by Gen. Butler to the Home is charged against it by the United States, and we see no reason why it may not be recovered from the Home by the United States, and satisfaction had out of the property of the Home.

There is no privity between the United States and Gen. Butler, and there is no way by which the United States can compel him to account.

It would be somewhat strange, therefore, if this action was not maintainable.

THE QUESTION OF JURISDICTION.

On May 14, 1887, the defendant moved in arrest of judgment for the reasons stated in his plea to the jurisdiction of the court filed on the same day (p. 37), namely, that the appointment of Judge Carpenter, judge of the district court of the district of Rhode Island, to hold the circuit court for the district of Massachusetts was invalid, because the instrument of appointment was not filed in the clerk's office of the district court for the district last named

This motion was heard by the circuit judge, who denied the motion for the reasons set forth in his opinion (pp. 44–46). It would be a waste of time to attempt to add anything to the reasoning of Judge Colt in that opinion.

Supposing, however, that the conclusions of Judge Colt are unsound, is this court at liberty to hold that the proceedings before Judge Carpenter were *coram non judice?*

The motion addressed to the learned circuit judge was extraordinary. It was the introduction into the suit of the National Home, etc., *v.* Butler of a proceeding analogous to a *quo warranto*, to try the title or right of Judge Carpenter to hold the circuit court and sit in that case.

Judge Carpenter was appointed to hold that court by the circuit judge under section 596 (R. S.), and if there was any irregularity in his appointment it could not be taken advantage of in this suit, and the proceeding to take advantage of the supposed irregularity was nothing less than a collateral attack on the judge's commission.

That Judge Carpenter acted, at least, *under color of legal authority* can not be gainsaid. When that is said, enough is said to make valid all his acts. As the constitutional court of South Carolina said in *Taylor* v. *Skrine* (2 So. Car. (Treadway) p. 696), "Public convenience as well as public justice requires that they should be supported. It would lead to incalculable mischief if all the proceedings under the several judges who have been thus appointed should be declared null and void." This language was used in a case where it was set up that the judgment was a nullity because the judge who rendered it was

appointed under a law afterwards pronounced unconstitutional by the court then applied to, unsuccessfully, to declare the judgment a nullity because the judge who sat was no judge.

But better still as well as more commanding is what this court say in *Norton* v. *Shelby County* (118 U. S., 425, 441):

> Offices are created for the benefit of the public, and private parties are not permitted to inquire into the title of persons clothed with the evidence of such offices and in apparent possession of their powers and functions. For the good order and peace of society their authority is to be respected and obeyed until in some regular mode prescribed by law their title is investigated and determined. It is manifest that endless confusion would result if in every proceeding before such officers their title could be called in question.

In *People* v. *Sassovich* (29 Cal. 480, 485), which involved the validity of a judgment sentencing the defendant to be hung, one of the errors assigned was that the judge of the trial court was appointed by the governor without authority of law. As to this assignment of error the court say:

> The person who filled the office of judge at the time this case was tried was appointed and commissioned by the governor under and in pursuance of the provisions of the act in question. He entered, therefore, under color of right and title to the office and became judge *de facto* if not *de jure*, and his title to the office can not be questioned in this collateral mode. (*The People* v. *White*, 24 Wend., 539; *McInstry* v. *Tanner*, 9 John., 133; *Hildreth's Heirs* v. *McIntire's Devisee*, 1 J. J. Marshall, 206.) His title can only be questioned in an action brought directly for that purpose as provided in the fifth chapter of the Practice act. The acts of *de facto* officers must be held valid as respects the public and the rights of third persons. A contrary doctrine, for obvious reasons, would lead to most pernicious results.

That this well-established principle applies to the acts of Judge Carpenter sitting as a judge of the circuit court of the district of Massachusetts does not seem to admit of doubt.

That the failure to file in the clerk's office of the district court of Massachusetts the instrument evidencing the appointment of Judge Carpenter by Judge Colt should have the effect of invalidating all acts done by Judge Carpenter in virtue of that appointment seems unreasonable to the last degree.

It is submitted that the record does not appear to afford ground for disturbing the judgment.

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Assistant Attorney-General, and of Counsel for the National Home for Disabled Volunteer Soldiers.